Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

CITY OF DALLAS, TEXAS, *Petitioner,*
v.
RO'WAN W. GOULD, DIRECTOR OF THE UNITED STATES FISH AND WILDLIFE SERVICE, *ET AL., Respondents.*

On Petition For A Writ Of Certiorari To The United State Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN C. MARTIN
Counsel of Record
AMY B. CHASANOV
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6032

THOMAS P. PERKINS, JR.
CHRISTOPHER D. BOWERS
City of Dallas
1500 Marilla Street
Dallas, TX 75201
(214) 670-3519

S. CASS WEILAND
ROBERT A. HAWKINS
Patton Boggs LLP
2001 Ross Ave., Ste. 3000
Dallas, TX 75201
(214) 758-1504

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

This case involves the U.S. Fish and Wildlife Service's ("FWS") compliance with the National Environmental Policy Act ("NEPA") when it established the boundaries for a new, permanent 25,281-acre national wildlife refuge along the upper Neches River in East Texas.

1. When establishing a permanent wildlife refuge covering thousands of acres, did FWS comply with NEPA when it (i) established a short-term time horizon that it knew would preclude consideration of reasonably foreseeable effects beyond that time horizon; (ii) excluded the known indirect impacts of its actions on a reservoir project planned, pursuant to Texas law, for the same area; and (iii) refused to consider any alternative that would allow both the wildlife refuge and the reservoir to proceed?

2. Whether the Fifth Circuit failed to follow this Court's "proximate causation" requirement, as enunciated in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), when it excused FWS's failure to assess, under NEPA, the indirect impacts associated with the loss of a municipal water source?

3. May a court properly hold that FWS's reliance on 20-year-old, inaccurate data did not affect its NEPA decision even though the data concerned the central environmental issue in FWS's decision, and despite the absence in the administrative record of any suggestion that FWS had accounted for the inaccuracy in its decisionmaking?

PARTIES INVOLVED

The respondents in this Court are:[1]

Rowan W. Gould, in his official capacity as Director of the United States Fish and Wildlife Service

Ken Salazar, in his official capacity as the Secretary of the United States Department of the Interior

Benjamin N. Tuggle, in his official capacity as the Regional Director of the Southwest Region (Region 2) of the United States Fish and Wildlife Service

United States Department of the Interior

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[1] Rowan W. Gould is substituted for H. Dale Hall, and Ken Salazar is substituted for Dick Kempthorne, pursuant to Supreme Court Rule 35(3).

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PETITION FOR WRIT OF CERTIORARI

The City of Dallas respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding.

OPINIONS BELOW

The opinion of the court of appeals is reported at 562 F.3d 712, and is reprinted in the attached Appendix, App. 1a-20a. The opinion of the district court on cross-motions for summary judgment is unreported, and is reprinted in the attached Appendix, App. 21a-59a. The district court's order granting Appellants' emergency motion for an injunction while the case was on appeal is reprinted in the attached Appendix, App. 60a-66a.

JURISDICTION

The opinion of the Fifth Circuit was filed on March 12, 2009. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4375, its implementing regulations adopted by the Council on Environmental Quality ("CEQ"), 40 C.F.R. §§ 1500-1508, as well as Texas Water Code, §§ 1.001-152.302, are reprinted in the attached Appendix, App., 67a-80a.

INTRODUCTION

This conflict pits the City of Dallas ("City") and the Texas Water Development Board ("TWDB"), and their duty to satisfy the water supply needs of the millions of current and future residents of North Texas, against FWS and its desire to establish a national wildlife refuge in a state that already boasts 19 other wildlife refuges and 600,000 protected acres.[1] Labeling the City and the State's extensive water management as "speculation," FWS overrode the exercise of a "quintessential state and local power," *Rapanos v. United States*, 547 U.S. 715, 738 (2006), without even a look at the effect upon future water supplies. FWS avoided analysis of the impact of its actions on State water resources by adopting a short planning horizon and relying upon twenty-year-old information. FWS thereby sidestepped study of the indirect effects of its refuge on water supply, and limited the range of alternatives so that none would include a reservoir.

Resolution of these legal issues will have permanent and profound effects on the State of Texas, as well as the City and its residents. This case also has consequences well beyond the parties here, implicating important, recurring federalism issues for state and local water planning activities across the nation, and particularly for communities

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[1] The City and the TWDB filed separate lawsuits challenging FWS's decision to create the refuge. The cases were consolidated. The TWDB is filing a separate petition for a writ of certiorari at the same time this petition is being filed. The City respectfully suggests that this Court consolidate the petitions and consider them together.

in the south and the arid west that routinely suffer from drought and water scarcity.

STATEMENT OF THE CASE

A. The City's and State's Plans for Designation of Fastrill Reservoir

In an effort to address Texas' persistent problems with respect to droughts and water shortages, in 1997 the Texas Legislature amended the Texas Water Code, and significantly changed water development and management for the State.[2] Under this Texas law, the TWDB is "responsible for administering a comprehensive statewide planning process intended to develop, manage, and conserve the water resources of the State of Texas." App. 22a n.1 (citing Tex. Water Code § 16.051(a) (Vernon 2007)). The 1997 amendments created regional planning groups that must consider "environmental water needs," water conservation and reuse, the development of new water supplies, and the effects of developing new water supplies on the State's waters. Tex. Water Code §§ 16.053(e)(5)(C), (F) (Vernon 2007). The City is in Region C, one of Texas' regional planning groups that report their water management strategies to the TWDB. App. 22a, n.1.

Due to population growth, increased municipal needs, and periodic droughts, the City's water needs are forecasted to grow significantly. The Region's Water Plan anticipates a critical shortage beginning

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[2] *See* Act of June 1, 1997, 75th Leg., R.S., ch. 1010, §§ 1.01-.02, 1997 Tex. Gen. Laws 3610 (amended) (codified at Tex. Water Code §§ 16.051-.053 (Vernon 2007)).

as early as 2010. These water shortages will have real consequences, not only on the "public health, safety, and welfare," and "natural resources," Tex. Water Code § 16.053(a), but, according to the 2006 Regional Water Plan, these shortages will engender socio-economic impacts, including reduced population, reduced jobs, lost income, and decreased tax revenues.

Only an extremely limited number of areas in Texas are suitable for reservoir construction, given hydrology, typography, geology, water transport issues, and other factors. Fastrill Reservoir was first identified in 1961, and included in 1984, 1997, 2001, and 2006 water management planning documents. App. 2a, 37a. According to the 2006 Regional Water Plan, Fastrill Reservoir is "uniquely suited to provide water supply," and is one of the City's few potential reservoir locations. Located along the upper Neches River, the State has designated it as a "critical resource" and "major recommended water strategy." App. 3a-4a. In fact, the record indicated that Fastrill Reservoir is the *only* new reservoir planned for the City in the next 50 years.

B. FWS's Plans To Designate The Refuge

In its 1985 "Land Protection Plan for Bottomland Hardwoods, Category 3, Texas and Oklahoma," FWS identified much of the same area along the upper Neches River as one of many potential new wildlife refuge sites. App. 3a, 23a. Although FWS prepared a draft Environmental Assessment ("EA") for the project in 1988, the refuge proposal was set aside due to lack of funding. App. 3a. After the City and State moved forward with their water management activities for the site, FWS revisited its proposal,

initiating public comment in June 2004 and issuing a draft EA in May 2005. App. 3a. The draft EA was only 38 pages (App. 41a) and, while it mentioned that the City's plans for the reservoir dated back to the 1980s, the EA did not include a substantive discussion of the proposed action's effects on the City's and State's water supplies. According to FWS, "because the Reservoir project was far beyond the planning horizon for the Refuge proposal, it was too speculative to determine how the two projects might interface." App. 44a.

The City participated in the public comment process and gathered additional information to aid FWS in its decision making. On March 9, 2005, the Dallas City Council, now aware that FWS was revisiting its refuge proposal, passed a resolution expressing its desire to work with FWS on a plan that would allow a refuge and reservoir to coexist, and funding a feasibility study. App. 3a. In its May 31, 2005 comment letter on the EA, the City asked FWS to postpone its refuge proposal until after the City completed its feasibility study, which would determine how a wildlife refuge and reservoir could complement one another. Other parties made similar comments. After the two-month public comment period, FWS did not revise a single word of its draft EA and a final EA was never issued. App. 3a.

On July 28, 2005, FWS determined that an Environmental Impact Statement ("EIS") was not necessary and issued a Finding of No Significant Impact ("FONSI"). App. 3a. In its FONSI, FWS claimed the reservoir was "speculative" and, for the first time, indicated that it was limiting its analysis of the impacts of its decision to only the next 20

years. As such, the FONSI did not consider the effects of water shortages. On June 11, 2006, the FWS Director signed the decision document, designating a 25,281-acre site within Texas' Anderson and Cherokee Counties as the Neches River National Wildlife Refuge. App. 23a. By its nature, the establishment of a national wildlife refuge permanently forecloses the use of the land within it for any purpose inconsistent with the refuge. On August 23, 2006, FWS accepted the donation of a one-acre conservation easement within the acquisition boundary of the refuge. App. 4a.

C. District Court's Decision

On January 10, 2007, the City and the TWDB (collectively, "Plaintiffs") filed separate actions, in two separate United States District Courts in Texas, against the U.S. Department of Interior, the U.S. Fish and Wildlife Service, and the responsible officials (collectively "FWS"). The cases were subsequently consolidated in the Northern District.

Plaintiffs argued, among other things, that FWS violated NEPA because the draft EA (i) failed to analyze the environmental and human impacts of the refuge on the State's and City's water supply, (ii) analyzed an unreasonably narrow range of alternatives, and (iii) inappropriately relied on antiquated data lifted from the previous 1988 draft EA. The parties filed cross-motions for summary judgment on the Plaintiffs' NEPA claims. On June 30, 2008, the District Court granted FWS's motion for summary judgment on all of the Plaintiffs' NEPA claims, and denied the Plaintiffs' summary judgment motions. The District Court's decision relied heavily upon *Sabine River Authority v. U.S. Department of*

Interior, 951 F.2d 669 (5th Cir. 1992). App. 29a-37a; *see also* App. 5a.

Notwithstanding the State's comprehensive analysis of both water shortages and the ways to address those shortages, the district court held "the effects of FWS's action upon the City's and the State's [water] supplies are not within the scope of NEPA" because "[w]hile it is *reasonably foreseeable that establishment of the Refuge will cause the Reservoir to be thwarted*, it is beyond FWS's capability and NEPA's scope to require FWS to identify all possible consequences that could be caused by the Reservoir not being built." App. 38a (emphasis added). The court also affirmed FWS's refusal to consider the City's' proposed joint refuge/reservoir alternative, finding that "[t]he Reservoir would not even be constructed until 2050 and planning for its construction was in the preliminary stages," therefore "it was not arbitrary and capricious for FWS to conclude that a combined Refuge/Reservoir alternative would be too speculative." App. 44a-45a. Finally, the district court affirmed FWS's reliance upon a twenty-year-old study based upon even older environmental data. The court concluded that the City did not prove "the new data and conclusions [the City provided to FWS] affect the ultimate environmental assessment," and held that FWS did not act arbitrarily and capriciously. App. 51a.

On September 4, 2008, the District Court entered an amended partial final judgment. App. 5a. The City and the TWDB (collectively "Appellants") each filed a Notice of Appeal of the district court's decision with the Fifth Circuit on September 8, 2008. App. 5a. The appeal was

expedited on September 22, 2008. App. 5a. While the case was pending before the Fifth Circuit, the District Court granted Appellants' Emergency Motion for an injunction, finding there were serious legal issues and Appellants were likely to suffer irreparable injury if the injunction was denied. App. 65a-66a.

D. Fifth Circuit's Decision

On March 12, 2009, the Fifth Circuit affirmed the District Court's decision. The court of appeals held that FWS was not required to analyze the effect of establishing the refuge on the State's and City's water supplies and management plans. App. 11a. The court found that those effects "are highly speculative and cannot be shown to be the proximate cause of future water shortages in Dallas." App. 11a. Given "the long time frame for the project," the court found FWS's EA need not consider the effects on the City's water supply because there was too much uncertainty over whether the reservoir would be constructed and the impact on City water supplies. App. 11a.

The court of appeals also affirmed FWS's refusal to consider the TWDB's and City's proposed alternative allowing a refuge and reservoir to co-exist. App. 9a. The court quoted FWS's explanation in its FONSI, where FWS asserted it could not fully evaluate a "dual proposal" (i.e., an alternative permitting a reservoir and refuge to co-exist) because reservoir planning was "speculative in the short-term" and "far beyond the planning horizon for

the refuge proposal (i.e., 20 years)." App. 8a-9a.[3] The court also concluded that "[t]he record reveal[ed] no alternative that allowed construction of the reservoir *and* served FWS' goal of preserving the bottomlands and wetlands of the Upper Neches." App. 9a (emphasis in original).

Finally, the court of appeals recognized that "analyzing the risks of an action requires an agency to use updated information or data" and that "reliance on out-of-date . . . information may render the analysis of effects speculative and uncertain, warranting the preparation of an EIS." App. 11a-12a. While the court recognized that "much of the data in the [2005] EA was lifted from the earlier EA prepared in 1988,"[4] App. 12a, it nonetheless found FWS's use of older data was not unreasonable and did not warrant further NEPA analysis. App. 13a. The court indicated that Plaintiffs had failed to show that the site had become so degraded (e.g., through clearcutting) that FWS's decision was arbitrary under NEPA. App. 13a.

REASONS FOR GRANTING THE PETITION

NEPA's fundamental purpose is to ensure that public officials and citizens consider accurate environmental information *before* decisions are made and *before* proposed federal action is taken. 40

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[3] The Fifth Circuit inaccurately attributed this 20-year planning horizon to FWS's EA; it actually did not appear until the subsequent FONSI.

[4] The EA was drafted in 1988 and relied primarily on data from the 1960s, 1970s, and mid-1980s.

C.F.R. § 1500.1(b).[5] Agencies are required to comply with NEPA's procedural requirements "to the fullest extent possible." 42 U.S.C. § 4332; 40 C.F.R. § 1500.6; *see also Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976). Judicial review of a NEPA action arises under the Administrative Procedure Act to determine whether an agency's NEPA compliance is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(a)(2). A court conducts a "searching and careful" inquiry. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); App. 6a. "The hard look doctrine applies to judicial review of agency decisions: courts must take a hard look to ensure that the agency took a hard look." Daniel Mandelker, NEPA Law and Litigation, § 3:7 at 3-15 (2d ed. 1999 & 2008 Supp.). Judicial review ensures that agencies engage in reasoned decision making, which includes an objective discussion of assumptions, rebuttal of contradictory evidence, and well-grounded record references. *Id.*

Here, the Fifth Circuit's opinion inappropriately "rubber stamped" FWS's NEPA decisionmaking, excusing the agency's failure to undertake a "thorough investigation into the environmental impacts of [its] action[.]" *Nat'l Audubon Soc'y v. U.S. Dep't of the Navy*, 422 F.3d 174, 185-86 (4th Cir. 2005). The Fifth Circuit's decision conflicts with well-settled NEPA jurisprudence from other circuits, and from this Court. Given the unique sovereign

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[5] The CEQ was established under NEPA, and its regulations are binding on federal agencies. App. 17a.

interests at issue, the confusion created by the Fifth Circuit's decision, and the circuit conflicts, this Court should grant the Petition to review three aspects of FWS's NEPA compliance: its refusal to consider indirect effects, its truncated consideration of reasonable alternatives, and its reliance on antiquated environmental data.

A. The Fifth Circuit's Application Of NEPA's Environmental Impacts Analysis Conflicts With The Holdings Of Other Circuits.

The Fifth Circuit's holding that FWS need not analyze the environmental impacts of its proposed action on the City's and State's water supply and management because the reservoir was too speculative, too far in the future, and lacked concrete steps (e.g., permits and funding), App. 11a, conflicts with other circuits. These circuits have uniformly required agencies to consider impacts on State water resources. Not only does it trigger a circuit conflict, but the decision also raises an important question with widespread national implications: whether the federal government can override the decisions of state and local governments on issues vital to State sovereignty, public health, and welfare, without accounting for these governments' long-term planning and management.

1. This Case Presents A Conflict With Other Circuits.

NEPA requires all federal agencies to prepare an EIS if their proposed action may significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). To determine whether the more detailed EIS is necessary, an agency may first

prepare an EA. 40 C.F.R. §§ 1501.4(b), (c). NEPA and CEQ's implementing regulations require an agency's EA to consider direct, indirect, and cumulative impacts associated with its proposed action and alternatives. 42 U.S.C. § 4332(2)(C)(ii); 40 C.F.R. §§ 1502.16(a), (b), 1508.7, 1508.8(a), (b), 1508.9(b), 1508.14, 1508.25; App. 9a, 34a. Indirect impacts include those "caused" by the government's actions, occurring "later in time or further in distance," but, that are, nonetheless "reasonably foreseeable."[6] 40 C.F.R. § 1508.8(b); *see also* App. 34a. They include "long-term effects," 40 C.F.R. § 1508.27(a), as well as "beneficial and detrimental effects, even if on balance the agency believes the effect will be beneficial." 40 C.F.R. § 1508.8(b). An agency cannot ignore the "uncertain, but probable, effects of its decisions" simply because they are in the future. CEQ, Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,031 (Mar. 23, 1981) (Answer to Question No. 18); *see also City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975).

Before the Fifth Circuit's opinion in this case, the case law has been uniform and clear: agencies cannot avoid their NEPA responsibilities by labeling future environmental effects as "speculative," even when other projects *have not yet been proposed*. *See, e.g., Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003) (even if

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[6] Indirect environmental effects are "reasonably foreseeable" if they are "sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision." App. 9a-10a (quoting *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005)).

extent of future air pollution caused by increased supply of coal produced due to proposed action is speculative, the *nature of effect* is foreseeable and agency may not ignore the effect in its analysis); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812 (9th Cir. 1999) (potential land exchange not speculative where press release was issued five months before Final EIS).[7] "The failure to fully consider an environmental impact has long been held to be arbitrary and capricious under the procedures set forth in NEPA." *Brady Campaign to Prevent Gun Violence v. Salazar*, -- F. Supp. 2d --, No. 08-2243, 2009 WL 763091, at *16 (D.D.C. Mar. 19, 2009).

"It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA[.]" *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973); *see also American Bird Cons. v. Fed. Commc'ns Comm'n*, 516 F.3d 1027, 1033 (D.C. Cir. 2008) (quoting same). An agency has a duty to make a "good faith effort . . . to describe the reasonably foreseeable environmental impact of the program, alternatives to the program and their reasonably foreseeable environmental impact, and the irreversible and irretrievable commitment of resources the program involves[.]" *Scientists' Inst. for Pub. Info.*, 481 F.2d at 1092; *see also* 46 Fed. Reg.

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[7] *See also Fritiofson v. Alexander*, 772 F.2d 1225, 1243 (5th Cir. 1985), *abrogated on other grounds by Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669 (5th Cir. 1992).

at 18,031 (Answer to Question No. 18: agency must "make a good faith effort to explain the effects that are not known but are 'reasonably foreseeable' ").

Here, the court of appeals approved, with little analysis or explanation, FWS's (i) adoption of a 20-year time horizon in its FONSI thereby avoiding analysis of impacts on future water supplies,[8] and (ii) concomitant assertion that the reservoir was "highly speculative." App. 8a-9a, 11a, 13a-14a. The court erred in rubber stamping FWS's assertion in its draft EA that the reservoir was "speculative in the short-term," App. 9a (quoting FONSI), and "highly speculative" given the "long time frame for the [reservoir] project." App. 11a; *see also* App. 13a-14a (upholding FWS's 20-year planning horizon). The court of appeals compounded its error by ignoring the City's and State's significant water management activities taken over the last decade to implement the reservoir, instead focusing on the lack of permits, land acquisition, and additional studies "necessary to a major public works project." App. 11a.[9] Based on this superficial analysis, the court of appeals dismissed the State's and City's legitimate concerns, concluding "the effects of establishing the

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[8] Federal agencies, including FWS, regularly analyze impacts from projects over substantially longer planning horizons. *See, e.g.*, 72 Fed. Reg. 10,719, 10,720 (Mar. 9, 2007) (Draft EIS evaluated no-action alternative over 50-year horizon).

[9] Here, the Fifth Circuit misstates the facts. FWS's FONSI acknowledges it was aware that (i) Fastrill Reservoir was included in a series of water management and planning documents, and (ii) a reservoir yield and feasibility study that included hydrological assessment, costs, scope and impacts of such a proposal was underway while the draft EA was published for public comment.

refuge on [State] water supplies are not concrete enough, nor closely enough related to the federal action, to require that they be included in the EA." App 11a.

The implications of these intertwined findings are two-fold. First, FWS need not analyze the impacts of establishing a refuge on the State's and City's planned reservoir and future water supplies. App. 10a-11a. Second, FWS may adopt an artificially narrow range of alternatives to preclude consideration of a joint refuge/reservoir alternative. App. 8a-9a, 44a-45a.

The court's finding that FWS need not consider these impacts violates well-established NEPA jurisprudence, which requires the indirect and cumulative effects analysis to consider "reasonably foreseeable future projects," not just shovel-ready projects that are permitted and fully-funded. Importantly, under Texas law, the State and localities are *required every five years* to plan their water resource and supply management activities for 50 years into the future. Here, the district court acknowledged "Fastrill Reservoir was listed as a planned reservoir in two regional water plans, a potential construction date has been set, the facility and unit costs are calculated, and the economic consequences of not adopting the proposed water management strategies have been estimated." App. 36a.[10] The City also conducted a Fastrill Reservoir Yield and Feasibility Study (March 2006 Draft), which provided additional information on the need for Fastrill Reservoir. FWS ignored the wealth of

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[10] *But see* App. 11a (claiming the City "never identified the precise role [of] the reservoir").

information available from the City and the TWDB, choosing instead to adopt an artificially constricted approach which circumvented any analysis of impacts on State water resources.

Other circuits have held that NEPA prohibits an agency from using such a results-oriented approach. For example, the Ninth Circuit holds that NEPA requires agencies to consider other "proposed actions" regardless of whether those actions have received permits or are shovel-ready. *Oregon Natural Res. Council v. Marsh*, 832 F.2d 1489, 1498 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 360 (1989); *cf. Border Power Plant Working Group v. U.S. Dep't of Energy*, 260 F. Supp. 2d 997, 1032 (S.D. Cal. 2003) (rejecting agency's unsupported assertion that future power plants were "rumors" and requiring agency to demonstrate that it took "hard look" at whether future power plants were reasonably foreseeable).[11]

The decision also conflicts with First and Ninth Circuit decisions that require NEPA analysis of any project if the plans are sufficiently precise to describe impacts "now" with sufficient specificity. In *Sierra Club v. Marsh*, 769 F.2d 868, 872, 878 (1st Cir. 1985), the First Circuit rejected the argument that a future project was too speculative simply because its precise nature and shape were unknown.

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[11] Prior Fifth Circuit precedent was consistent with the Ninth Circuit's rule. *See, e.g., Fritiofson*, 772 F.2d at 1247; *Shoreacres*, 420 F.3d at 453 n.13; *Texas Comm. on Natural Res. v. Van Winkle*, 197 F. Supp. 2d 586, 619 (N.D. Tex. 2002) (impacts of neighboring land use plans were reasonably foreseeable where financing was passed and several studies recommended the actions, even though *no permit approvals* had been granted).

There, the court found that the agency had to consider plans and studies completed by the community and property owner in its EA because the effects at issue were precise enough to be considered, and required the agency to prepare an EIS. *Id.* at 877-79. Likewise, in *Oregon Natural Resources Council Fund v. Goodman*, 505 F.3d 884, 892-93 (9th Cir. 2007), the Ninth Circuit remanded the Forest Service's NEPA analysis because it failed to consider the impact of two future, reasonably foreseeable, projects on the agency's expansion of a ski area.

This decision is also contrary to the District of Columbia and Ninth Circuit's clear directive: "[r]easonable forecasting and speculation is . . . implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'" *Scientists' Inst. for Pub. Info.*, 481 F.2d at 1092; *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002) (quoting same). In *Kern*, the Ninth Circuit held that BLM's cumulative impacts analysis for selected timber sales was "inadequate under NEPA" because "it performs no cumulative impact analysis of 'reasonably foreseeable future actions' outside the [administrative unit]." *Id.* at 1075.

Further, if an agency utilizes a limited temporal scope, as the FWS did here, the agency must demonstrate that it "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 954 (9th Cir. 2003) (quoting *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1441 (9th Cir.

1990)). For example, in *Selkirk*, a case the Ninth Circuit deemed "extremely close," the court upheld the Forest Service's selection of a three-year time period to analyze the timber harvesting project effects because the governing state regulations were "emergency" rules in place for only three years while permanent rules were being drafted, and the federal rules were also in a state of flux. 336 F.3d at 962-63.

In this case, there is no evidence in the record nor any case law to support FWS's post hoc 20-year time horizon, and the Fifth Circuit should not have approved it. FWS seeks to create a *permanent* refuge which will lock up the land forever and foreclose the City's development of Fastrill Reservoir. *See, e.g.*, 65a-66a. Further, the refuge is just as speculative as the reservoir, given that refuges are usually completed over long time periods, there is no assurance that funding will be available to acquire all of the land within the refuge boundaries within a 20-year timeframe, and internal FWS documents indicated this refuge was ranked last among a crowded field of Texas projects vying for limited funding.

2. The Fifth Circuit's Finding That The Reservoir Was Speculative Led It To Approve An Unreasonably Narrow Range Of Alternatives.

The Fifth Circuit's approval of FWS's narrow range of alternatives was based on the erroneous conclusion that the reservoir was too speculative for the agency to consider a "dual proposal" that would allow the reservoir and refuge to coexist. App. 8a-9a. NEPA requires that an EA (like an EIS) include a reasonable range of alternatives to the agency's

proposed action. 42 U.S.C. §§ 4332(2)(C)(ii), (E); 40 C.F.R. §§ 1508.9(b), 1508.25(b); 46 Fed. Reg. at 18,026, 18,037 (Answers to Question Nos. 1a, 36a). The alternatives section is the "heart" of the environmental review, 40 C.F.R. § 1502.14, and NEPA mandates that the agency "study, develop, and describe appropriate alternatives to [the] recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E); *see also* 40 C.F.R. § 1507.2(d). Under NEPA, resources include water. *See, e.g., Olmsted Citizens for a Better Cmty. v. United States*, 793 F.2d 201, 205 (8th Cir. 1986). The alternatives analysis is particularly important when an EA is proposed. *See Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283, 1296 n.9 (8th Cir. 1990) (alternatives requirement is the major environmental responsibility that agencies must meet when EA prepared); *Envtl. Def. Fund, Inc. v. Army Corps of Eng'rs*, 492 F.2d 1123, 1135 (5th Cir. 1974) (alternatives analysis in an EA is "supplemental to and more extensive" than that in EIS); *accord Olmsted Citizens*, 793 F.2d at 208. An agency cannot narrowly restrict its alternatives analysis, ignore a commenter's suggested alternatives, or consider only a limited geographical scope when the proposed project's purpose is not similarly constrained. *Davis v. Mineta*, 302 F.3d 1104, 1120-22 (10th Cir. 2002); *Muckleshoot Indian Tribe*, 177 F.3d at 813.

Several circuits, including the Fifth Circuit, have recognized that an alternative is *per se* "reasonable" when it achieves the purpose and need statement articulated *in the agency's EA*. *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1097 (9th Cir. 2006);

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 198 (D.C. Cir. 1991); *City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983), *appeal dism'd*, 465 U.S. 1055; *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974). Here, the court formulated its own, much narrower purpose and need statement to dismiss the City's proposed refuge/reservoir alternative. App. 9a. FWS's draft EA *never* limited the purpose and need of the agency's action to a particular section of the Neches River that might preclude the joint refuge/reservoir alternative.

The Court's newly-articulated rationale conflicts with both the Seventh and Ninth Circuits, which prohibit agencies from considering alternatives in only one discrete area when the agency's purpose and need statement is not similarly confined. *See, e.g.*, *Simmons v. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997); *Methow Valley Citizens Council v. Reg'l Forester*, 833 F.2d 810, 815 (9th Cir. 1987), *overruled on other grounds sub. nom. Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

In allowing FWS to adopt two nearly identical alternatives (*see* App. 3a), the Fifth Circuit's decision also directly conflicts with decisions by the Ninth and Tenth Circuits. Those circuits forbid agencies from limiting their alternatives analysis to only a no-action alternative and other "virtually identical alternatives." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1218-19 (9th Cir. 2008) (agency's consideration of five alternatives was "a very narrow range" given their similarity); *Davis v. Mineta*, 302 F.3d at 1122 (finding agency violated NEPA when its EA improperly rejected alternatives "in a conclusory and

perfunctory manner" and only studied in detail the no-build alternative and the preferred alternative); *Muckleshoot Indian Tribe*, 177 F.3d at 813 (invalidating Forest Service's EIS for a land *preservation* proposal that considered a no-action alternative and two virtually identical alternatives, with one being slightly larger than the other); *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F. Supp. 2d 1069, 1088 (E.D. Cal. 2004) (agency's evaluation of two nearly identical alternatives along with a no-action alternative failed to satisfy "hard look" requirement); *Natural Res. Def. Council, Inc. v. Evans*, 168 F. Supp. 2d 1149, 1160 (N.D. Cal. 2001) (EA's alternatives inadequate because agency only considered no-action and preferred alternative), *different portion of opinion vacated*, 316 F.3d 904 (9th Cir. 2003).

Moreover, the administrative record demonstrates that, in its comments on the EA, the City requested that FWS consider a joint refuge/reservoir alternative. When, as here, another alternative was raised during the comment period, other Circuits require the agency to explain why it rejected the proposed alternative. *See, e.g.*, *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1288 (1st Cir. 1996) ("Instead of 'rigorously explor[ing]' the alternative . . . [the] Final EIS did not respond to these comments at all. . . . This failure violated the [Agency's] EIS obligation under NEPA."); *NRDC*, 168 F. Supp. 2d at 1160 (EA's alternatives inadequate when agency did not explain its failure to address commentor's proposed alternatives); 40 C.F.R. § 1502.14(a); 46 Fed. Reg. at 18,035 (Answer to Question No. 29b: agency must respond to a commentor's reasonable alternative, *including*

alternatives discovered or developed later, and discuss that alternative in supplemental analysis).[12] NEPA's public comment procedures are "at the heart of the NEPA review process," and an agency's failure to consider the public's comments deprives decision makers and the public from an opportunity to consider other alternatives. *See, e.g., California v. Block*, 690 F.2d 753, 770 (9th Cir. 1982). Here, the court should have required FWS to either analyze a joint refuge/reservoir alternative, or explain why it did not meet the purpose and need of the agency's action.

The Fifth Circuit's decision inappropriately shifted the burden for developing alternatives from FWS to the City. The Second, Ninth and Tenth Circuits all prohibit an agency from shifting its NEPA duties to the public. *County of Suffolk v. Sec'y of the Interior*, 562 F.2d 1368, 1385 (2d Cir. 1977); *see also Jette v. Bergland*, 579 F.2d 59, 63 (10th Cir. 1978), *overruled on other grounds, Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992); *Coleman*, 521 F.2d at 671. *Cf. Public Citizen*, 541 U.S. at 764-65 (noting *agency* bears primary responsibility for ensuring NEPA compliance and rejecting argument that NEPA analysis was inadequate because challengers had not adequately alerted the agency to their position

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[12] *Cf. Sabine River Auth. v. U.S. Dep't of Interior*, 745 F. Supp. 388, 400 (E.D. Tex. 1990) (in response to comments on its draft EA, FWS *revised* its draft EA to (i) include "a responsive discussion of the water-supply issues raised by [Sabine River Authority]," and (ii) "address the alternative of establishing a refuge in conjunction with the Waters Bluff [reservoir] project").

and contentions to allow the agency to meaningfully consider them). Further, an agency is not absolved from considering an alternative because a specific proposal was not received until after the closure of the public comment period. 46 Fed. Reg. at 18,035 (Answer to Question No. 29b). Review by this Court is necessary to resolve the conflicts this erroneously-decided case has created.

3. The Issue Presented By The Conflict Has Great Practical Import.

The Fifth Circuit's ruling has a significant impact on the millions of current and future residents of North Texas. The NEPA and federalism issues raised here also extend beyond Texas' borders. The consequences of this holding resonate with long-term state and local planning and management activities across the nation. And the decision implicates not just water management issues, but also has import any time federal and state or local governments seek to use the same limited natural resources for different purposes.

There is no question that an adequate water supply fulfills one of NEPA's central purposes, to "promote efforts which will . . . stimulate the health and welfare of man." 42 U.S.C. § 4321; *Friends of Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501, 505 (6th Cir. 1995) (the delay and cost associated with preparation of an EIS would harm the otherwise positive impact on health and welfare that the dam project would otherwise promote). NEPA and CEQ's regulations require agencies to consider these types of effects on the human environment. *See* 42 U.S.C. § 4331(a); 40 C.F.R. §§ 1508.14, 1508.27(b)(2). Courts have repeatedly held that

water is a vital component of the human environment, and courts require federal agencies to analyze the potential impacts of their actions on water resources. *See, e.g., Olmsted Citizens*, 793 F.2d at 205 (EIS generally required for federal actions that threaten water supply); *Coleman*, 521 F.2d at 675 (long-term water supply effects must be considered in NEPA analysis); *United States v. 27.09 Acres of Land*, 760 F. Supp. 345, 353 (S.D.N.Y. 1991) ("even marginal degradation of drinking water is environmentally significant" requiring EIS); *North Carolina v. Hudson*, 731 F. Supp. 1261, 1273 (E.D.N.C. 1990) ("[w]ater is a necessity of life. It is a valuable resource which must be protected and conserved and shared by all").

If the Fifth Circuit is correct, federal agencies are free to ignore the City's and the State's legislatively-mandated water management and planning activities as pure speculation. By allowing FWS to truncate its NEPA effects analysis and label Appellants' water management activities "speculative," the Court eviscerates the Appellants' sovereignty over State waters. Such an approach clearly conflicts with this Court's edicts limiting the federal government's ability to dictate issues such as land and water use planning, which are "quintessential state and local power[s]." *Rapanos*, 547 U.S. at 737-38; *see also Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (state has independent interest in "all the earth and air within its domain"); *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 518-19 (2007) (quoting same).

As the number of prime reservoir locations decrease, the State and its citizens are left with less desirable alternative sites that are more expensive

and more environmentally costly. These alternative sites also place existing water supplies under additional stress given increased demand, which could in turn decrease water supply and harm the well being of the citizens and businesses that depend upon those supplies. The implications of a water supply crisis are dire: water scarcity threatens people, as well as flora, fauna, and water bodies. Further, limited supplies will create additional conflict between various government entities and regions who are all seeking to create new reservoirs to meet existing and future demand.

Presciently, Petitioner Texas Water Conservation Association ("TWCA") argued in its petition to this Court that the Fifth Circuit's decision in *Sabine River* would be used to prevent or impact other, future water supply projects, and that FWS could continue to take "every remaining surface water supply site in Texas out of development without ever considering a critical impact on human health and welfare." TWCA Pet. for a Writ of Cert., No. 91-1927, 1992 WL 12074373, at *7 (June 2, 1992). That is precisely what has happened. This case reinforces the Fifth Circuit's holding in *Sabine River*, that a federal agency can arbitrarily block important State water supply management and planning simply by moving to preserve land, thereby escaping NEPA's "hard look" requirements. This conflict between the federal government's desire to preserve land for wildlife and the state and local government's need to provide an adequate water supply for their citizens will continue to be intense and recurring. Review by this Court is warranted to resolve this important issue with severe, deleterious effects on public health and welfare.

B. The Fifth Circuit's Decision That The Refuge Was Not The Proximate Cause Of The Effects On The State's Water Supply Fails To Follow This Court's Precedent.

The Fifth Circuit's conclusion that "the effects of establishing the refuge . . . cannot be shown to be the proximate cause of future water shortages in Dallas," App. 11a, conflicts with this Court's jurisprudence, as enunciated in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), and further expounded upon in *Public Citizen*. *Public Citizen* considered whether the Federal Motor Carrier Safety Administration's ("FMCSA") NEPA analysis of its proposed regulations had to consider the environmental effects of Mexican trucks that would soon be allowed to enter the United States. 541 U.S. at 762-64. This Court upheld the agency's EA, because only the President or Congress—not FMCSA—had the ability to change the environmental effects. *Id.* at 766. *Public Citizen*'s key holding was that an agency's NEPA analysis need not consider effects "where [that] agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, [because] the agency cannot be considered a legally relevant 'cause' of the effect." *Id.* at 770; *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1144 (11th Cir. 2008) (quoting same). The court concluded: "*because FMCSA has no discretion to prevent the entry of Mexican trucks*, its EA did not need to consider the environmental effects arising from the entry." 541 U.S. at 770 (emphasis added); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2535 (2007). *Public Citizen*

and *Shoreacres*—which both found that an agency's NEPA analysis need not consider effects caused by other federal government actors—do not apply here.[13]

Conversely, when an agency has authority to create or prevent effects, NEPA requires a "hard look" at those effects and their inclusion in the EA. In *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1134-35 n.20 (9th Cir. 2007), the Ninth Circuit held that "*Public Citizen*'s limitation on NEPA does not apply in this case" because "BLM has significant authority (under [the statute at issue]) to regulate private activities on public land, including [the private company's] use of public roads." *See also Humane Soc'y v. Johanns*, 520 F. Supp. 2d 8, 23-27 (D.D.C. 2007).

Sierra Club v. Mainella, 459 F. Supp. 2d 76 (D.D.C. 2006) is on point and directly contrary to the Fifth Circuit's conclusion here. *Mainella* held that the National Park Service's ("NPS") NEPA analysis of permitted directional drilling operations beneath a National Preserve must evaluate the impacts of the surface activities of the drilling that would occur outside the Park. *Id.* at 105. The court rejected

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[13] *Shoreacres* was the only proximate cause case cited by the Fifth Circuit, and it simply supplied the general proposition of law that a Plaintiff must establish the alleged effect is a proximate case of the proposed agency action. App. 10a. *Shoreacres* rejected the argument that NEPA required the Corps to account for the indirect effect of future ship channel deepening caused by a newly-permitted terminal because only Congress—not the Corps—had authority to deepen the channel. 420 F.3d at 452. In *Shoreacres*, there was no proposal, no economic justification for deepening the channel in the foreseeable future, and Congressional approval was necessary and unlikely to occur for decades. *Id.* at 453.

NPS's argument that it did not have authority to regulate surface operations outside the Park: "*Public Citizen* extends only to those situations where an agency has 'no ability' because of lack of 'statutory authority' to address the impact." *Id.* The impacts of surface drilling activities had to be analyzed because they were "functionally inseparable from the downhole drilling activities" that were the subject of the NEPA analysis, and would only take place with NPS's grant of operator access. *Id.*

Similarly, in *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2004), the Ninth Circuit considered whether the Corps' NEPA analysis needed to consider an entire residential development when the Corps' actions were limited to approving permits to allow a residential developer to construct road crossings and facilities over jurisdictional waters. *Id.* at 1113. The Ninth Circuit agreed with the district court's finding that the Corps' analysis violated NEPA when it failed to consider the environmental effects associated with the entire project. The court noted that "denial of a permit would prevent the site from developing in a manner consistent with the developer's purpose" therefore "the Corps permits would have an effect on the whole property," and the "NEPA analysis should have included the entire property." *Id.* at 1122.

The Fifth Circuit's failure to follow this Court's jurisprudence should be reviewed and overturned. The operative question is whether FWS has the ability (i.e., statutory authority) to prevent—or create—the environmental impacts identified by the City and the State. Here, the clear answer is yes. As a direct result of FWS's refuge decision, the City

cannot build Fastrill Reservoir. There is a close causal connection between the agency's action and the effects about which the City complains should have been analyzed under NEPA (i.e., elimination of an available source of human water supply). FWS's decision is "functionally inseparable" from the City's inability to use this site for a reservoir: no other action permanently blocked the City from using this location as a reservoir.

C. The Fifth Circuit's Approval Of FWS's Outdated Data Conflicts With Decisions By Other Circuits.

NEPA requires agencies to use accurate information: "The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b); *see also id.* § 1502.24; App. 11a-12a; *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) (applying 40 C.F.R. § 1502.24's scientific integrity requirement to EA), *overruled by Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008). Agencies are required to take a "hard look" at the environmental consequences in the first place. *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1178 (10th Cir. 2008).

Agencies must carefully reexamine their NEPA analysis when it is more than five years old, and supplement that analysis when there are significant new circumstances or relevant information. 46 Fed. Reg. at 18,036 (Answer to Question No. 32). Agencies also have a duty to disclose to the public when relevant data are incomplete or unavailable. 40 C.F.R. § 1502.22. An agency violates NEPA

when it relies upon antiquated data. *See, e.g., Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005).

Because the purpose of an EA is to determine whether a proposed project's impacts could be potentially significant (and therefore require a more detailed EIS), 40 C.F.R. § 1508.9(a)(1), the agency must use high-quality information at the EA stage. An EA—and the entire NEPA framework requiring agencies to take a "hard look" at the potential environmental consequences of an action—is undermined if it is based on outdated, inaccurate information. Poor quality data affects an agency's analysis of environmental consequences, impairs the selection and evaluation of appropriate alternatives, and prevents decision-makers and the public from more fully understanding the effects of the agency's actions. *N.C. Alliance for Transp. Reform, Inc. v. U.S. Dep't of Transp.*, 151 F. Supp. 2d 661, 695 (M.D.N.C. 2001).

FWS and the Fifth Circuit acknowledge that FWS's EA relies upon data from a 1988 Draft EA completed almost 20 years earlier to analyze FWS's refuge alternatives and the refuge's impacts on wildlife, vegetation, the environment, air, and socioeconomic conditions. App. 12a, 49a. Ignoring NEPA's clear purpose and other circuit holdings, the court upheld FWS's uninformed decision making. The court of appeals erroneously accepted the agency's post hoc rationalizations in its briefing that information compiled over the past two decades would not have made a difference. Without citation, the court placed the burden of NEPA compliance on the City, stating that the City must compile baseline information to show the "site had become so

degraded–for example, by substantial clearcutting of the bottomland hardwoods such that it would not support migrating waterfowl even if protected–such a showing may well render the decision to rely on older data arbitrary within the meaning of NEPA." App. 13a. The Fifth Circuit added that if an agency's actions superficially appear environmentally beneficial, NEPA's "high quality" data requirements are optional. App. 12a (distinguishing instant case because FWS action would not "intrude on a site"). The court concluded that, under NEPA, reliance on old data to assess environmental impacts *in an EA* is not unreasonable. App. 13a. These holdings contradict the letter and spirit of NEPA.

This Court's review is necessary to resolve the conflict this decision creates with other circuits. The Ninth and Tenth Circuits require an agency's NEPA analysis to be based on accurate, current information.[14] Indeed, a stay of agency action is appropriate if the agency relied on six-year-old data, until accurate data is collected to provide a proper assessment of a proposed action's impact. *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000). Here, as in *Klamath-Siskiyou*

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[14] *See, e.g., New Mexico v. Bureau of Land Mgmt.*, 565 F.3d 683, 704-07 (10th Cir. 2009) (remanding to BLM to update its analysis to consider the environmental impacts associated with alternative introduced after the Draft EIS); *Lands Council*, 395 F.3d at 1031-32 (failure to disclose up-front in its NEPA analysis the known shortcomings of its data and modeling violates NEPA); *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704-05 (9th Cir. 1993) (agency's reliance on "stale scientific evidence" violates NEPA and agency must re-examine its chosen alternative); *Klamath-Siskiyou Wildlands Ctr.*, 373 F. Supp. 2d at 1081 (ten-year-old wildlife data inadequate).

Wildlands, FWS's conclusions about the bottomland hardwoods and habitat it sought to protect "is based on incomplete and outdated information, which renders the overall conclusions uncertain." 373 F. Supp. 2d at 1081.

In its NEPA analysis, FWS made no effort to obtain recent information on wildlife and bottomland hardwoods within its proposed refuge boundary, but instead relied upon the data in its 1988 Draft EA, despite available evidence demonstrating that the prior data was no longer reliable. *See, e.g.*, App. 50a (FWS's 2004 site visit indicated land within boundary "partially harvested since we looked at the site in the late 1980s"). Unlike FWS, the City did undertake an effort to analyze potential alternative refuge sites, as well as recent bottomland hardwood acreage. In the report it commissioned, the City learned that, since 1985, *bottomland hardwood landcover within the designated refuge area had dwindled from 71 percent to 31 percent.* App. 12a, 47a, 50a. This data "was available to FWS or was in its possession at the time the agency decision was made." App. 47a n.8.

The agency ignored this more recent data during its decisionmaking. In its briefing, FWS claimed, for the first time, that this new information would not have changed its analysis. This Court has never tolerated such post-hoc rationalizations, or the district court's and Fifth Circuit's reliance on them. App. 12a & 48a. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); *Motor Vehicles Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) (courts consider agency's

reasoning at the time of its decisionmaking, not subsequent arguments in litigation).

The court's erroneous decision is not devoid of consequences. If FWS was required to conduct an analysis using recent environmental information, FWS's environmental impacts analysis would have been different, and the agency may have decided to designate a refuge in a different location, thereby allowing the State and City to move forward with their water management plans. The court did not require FWS to meet NEPA's hard look requirements, and its decision conflicts with decisions by the Ninth and Tenth Circuits.

The Fifth Circuit's suggestion that older data is sufficient for presumably "environmentally beneficial" actions, App. 12a, directly conflicts with the Tenth Circuit's jurisprudence. The Tenth Circuit has considered and rejected an "exception" for perceived environmentally beneficial actions.[15] In *Catron County Board of Commissioners, New Mexico v. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), the Secretary of Interior sought to designate 74 miles of river as critical habitat under the Endangered Species Act ("ESA"). The Secretary claimed these ESA activities were exempted from NEPA, but the Tenth Circuit disagreed: "[w]hile the protection of species through preservation of habitat may be an environmentally beneficial goal, Secretarial action under ESA *is not inevitably*

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[15] The Department of the Interior's NEPA Departmental Manual confirms the point, finding that a new refuge system unit—whose purpose is undoubtedly to protect the environment—"normally" requires an EIS when there are conflicts with state and local land use. App. 16a (citing 62 Fed. Reg. 2375, 2382 (Jan. 16, 1997)).

beneficial or immune to improvement by compliance with NEPA procedure." *Id.* at 1437 (emphasis added); *accord High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235, 1245 (D. Colo. 2006); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 108, 134 (D.D.C. 2004). *See also Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 993 (5th Cir. 1981) ("NEPA is concerned with all significant environmental effects, not merely adverse ones."). Given NEPA's fundamental purpose to inform the public and government officials of the environmental consequences associated with an agency's actions, FWS's actions—even if the designation of habitat is environmentally beneficial—violated the Tenth Circuit's clear precedent. *See Catron*, 75 F.3d at 1437.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN C. MARTIN *Counsel of Record* AMY B. CHASANOV Patton Boggs LLP 2550 M Street, NW Washington, DC 20037 (202) 457-6032 S. CASS WEILAND ROBERT A. HAWKINS Patton Boggs LLP 2001 Ross Ave., Ste. 3000 Dallas, TX 75201 (214) 758-1504 *Counsel for Petitioner*	THOMAS P. PERKINS, JR. CHRISTOPHER D. BOWERS City of Dallas 1500 Marilla Street Dallas, TX 75201 (214) 670-3519

APPENDIX

Filed March 12, 1009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-10890

CITY OF DALLAS, TEXAS

Plaintiff-Appellant

v.

H. DALE HALL, ET AL.

Defendant-Appellee

and

TEXAS WATER DEVELOPMENT BOARD

Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas

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Before SMITH and SOUTHWICK, Circuit Judges, and ENGELHARDT, District Judge.*

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* District Judge of the Eastern District of Louisiana, sitting by designation.

KURT D. ENGELHARDT, District Judge:

After preparing an Environmental Assessment ("EA") of the proposed Neches Wildlife Refuge in East Texas, the U.S. Fish & Wildlife Service ("FWS") announced its Finding of No Significant Impact ("FONSI"), obviating the need to prepare an Environmental Impact Statement ("EIS"). FWS then set an acquisition boundary for the refuge and accepted a conservation easement within that boundary. These actions precluded a reservoir the City of Dallas ("City") and the Texas Water Development Board ("TWDB") had proposed for the same site. The City and TWDB sued in federal district court claiming that the EA that FWS prepared was flawed, that under the National Environmental Policy Act ("NEPA") the agency was required to prepare an EIS, and that the establishment of the refuge violated the Tenth Amendment. The district court dismissed several of the Appellants' claims and granted FWS' motion for summary judgment on others. We AFFIRM.

I. BACKGROUND

In 1961, the State of Texas first identified a site along the Upper Neches River in Anderson and Cherokee Counties as a potential reservoir to serve the growing Dallas/Ft. Worth Metroplex. Dubbed the Fastrill Reservoir, the site was again included in a state water agency resources plan in 1984, and in the 1997 and 2001 regional water plans issued by TWDB. The City and TWDB's plan envisioned constructing the reservoir in 2050 and tapping it in 2060. There is nothing in the record prior to 2005 that indicates that the City or TWDB took any steps

to develop the site beyond including it–among other possible reservoir sites–in regularly updated planning documents.

In 1985, FWS identified the same site as a possible wildlife refuge, since its native bottomland hardwood forest and wetlands provide an important wintering habitat for migrating waterfowl. That year, FWS listed the site as high-priority for protection. FWS approved a preliminary refuge proposal in 1988 and prepared a draft EA, but put the project aside for lack of funding. The project was revived in 2003 and the agency initiated public comment in June 2004. Public workshops were held in July 2004 and FWS made a presentation to the regional water planning group in October of that year. Another EA was prepared, which listed three alternatives: no action, the recommended 25,281-acre configuration, and a narrower 15,294-acre configuration. The EA referenced the reservoir proposal and noted that both the larger and smaller refuge configurations would prevent the reservoir from being built. The EA was distributed to public officials and interested groups, open meetings were held in May 2005, and it was open for public review and comment for two weeks that same month. More than 1,600 comments were received, but the EA was not revised, and a "final" EA was not issued. On July 28, 2005, FWS concluded that an EIS was unnecessary and prepared a FONSI.

By early 2005, the City was aware that FWS had revived the refuge proposal. On March 9, 2005, the Dallas City Council passed a resolution expressing a desire to work with FWS on a plan that would allow the reservoir and the refuge to coexist and authorizing a feasibility study. On August 16th, the

Texas legislature designated the Fastrill Reservoir as a "critical resource," and the January 2006 regional water plan recommended building the reservoir as part of its water management strategy. Meetings were also held between the director of FWS and City representatives to discuss alternative sites for the refuge, and state and FWS representatives continued to communicate through the first half of 2006 about alternative plans that would allow a refuge and a reservoir to coexist. The City and TWDB scheduled–though did not actually begin–a series of engineering and environmental studies. By June 11, 2006, the day FWS designated an "acquisition boundary" for the refuge encompassing the larger 25,281-acre site, the feasibility study was not completed nor had Appellants taken any concrete steps toward planning the reservoir, such as applying for permits. Accompanying the designation was a Conceptual Management Plan outlining how land within the boundary would be acquired. The Neches Wildlife Refuge was set to come into existence when FWS, by purchase or donation, took title to or an interest in property within the acquisition boundary. On August 23, 2006, FWS accepted a one-acre conservation easement from a landowner within the acquisition boundary.

TWDB and the City filed the instant suits on January 10, 2007, arguing *inter alia* that the EA was flawed, that FWS should have prepared an EIS, and that the refuge violated the Tenth Amendment. On October 24, 2007, the district court dismissed five of the City's claims, including the constitutional claim, and two of TWDB's claims, under Rule 12(b)(6). The parties filed cross-motions for partial summary

judgment on the NEPA claims, and on June 30, 2008, the district court denied the Appellants' motions and granted FWS's motion. Relying heavily on *Sabine River Auth. v. U.S. Dep't of the Interior*, 951 F.2d 669 (5th Cir. 1992), the district court held that an EIS was not required because the establishment of the acquisition boundary did not cause any change in the physical environment. The court concluded that the refuge's effect on the City's water supply was speculative and not within the scope of NEPA. The court also found that the EA considered a reasonable range of alternatives and evaluated the necessary information. The City and TWDB moved for an injunction pending appeal and for entry of final judgment, which were granted on July 28, 2008. The parties subsequently filed a joint motion to amend the judgment, which was granted on September 4, 2008. Notice of appeal was filed on September 8, 2008, and the appeal was expedited on September 22, 2008.

II. DISCUSSION

A. Standard of Review

We review the district court's grant of summary judgment *de novo*. *Terrebonne Parish Sch. Bd. v. Mobil Oil Corp.*, 310 F.3d 870, 877 (5th Cir. 2002). The court may only set aside an agency's decision not to prepare an EIS where a plaintiff establishes that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 375-76 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). Under this highly deferential standard of review, a reviewing

court has the least latitude in finding grounds for reversal. *Sabine River*, 951 F.2d at 678. Courts may not use review of an agency's environmental analysis as a guise for second-guessing substantive decisions committed to the discretion of the agency. But "[i]n conducting our NEPA inquiry, we must 'make a searching and careful inquiry into the facts and review whether the decision . . . was based on consideration of the relevant factors and whether there has been a clear error of judgment.'" *Marsh*, 490 U.S. at 378 (citation omitted).

We review *de novo* a district court's dismissal pursuant to Rule 12(b)(6). *Ballard v. Wall*, 413 F.3d 510, 514 (5th Cir. 2005). "All of the plaintiff's allegations must be accepted as true, and the dismissal will be affirmed only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Id.* at 514-15 (internal quotation omitted). However, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) (quotation omitted).

B. Sufficiency of the Environmental Assessment

NEPA does not require federal agencies to favor an environmentally preferable course of action, but rather requires that they take a "hard look at environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe*, 427 U.S. at 410 n.21). The statute requires "all agencies of the Federal Government . . . [to] include [an EIS] in every recommendation or

report on proposals for . . . major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2). An EIS is not necessary when the federal action is not major or does not have a "significant impact on the environment." *Sabine River*, 951 F.2d at 677. To determine whether an EIS is necessary, an agency will perform an EA. *Sierra Club v. Espy*, 38 F.3d 792, 802 (5th Cir. 1994); 40 C.F.R. § 1508.9(a)(1) (defining an EA as a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact"). An EA is "a rough cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement–which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project–is necessary." *Sabine River*, 951 F.2d at 677 (citing *Cronin v. U.S. Dep't. of Agriculture*, 919 F.2d 439, 443 (7th Cir. 1990)). An EA will result in a finding that an EIS is necessary or in a FONSI, indicating that no further study of environmental impacts is warranted. *La. Crawfish Producers Ass'n-West v. Rowan*, 463 F.3d 352, 356 (5th Cir. 2006).

1. Failure to Consider Alternatives

An EA must discuss alternatives to the planned action, but need not discuss all proposed alternatives. *See* 40 C.F.R. § 1508.9(b) (assessment "[s]hall include brief discussions of the need for the proposal, of alternatives . . . of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted"); *see also La. Crawfish Ass'n*, 463 F.3d at 355 (NEPA "does not

require that all proposed alternatives, no matter their merit, be discussed in the EA."). "[T]he range of alternatives that the [agency] must consider decreases as the environmental impact of the proposed action becomes less and less substantial." *Sierra Club*, 38 F.3d at 803; *see also Highway J Citizens Group v. Mineta*, 349 F.3d 938, 960 (7th Cir. 2003) ("When . . . an agency makes an informed decision that the environmental impact will be small . . . a less extensive search [for alternatives] is required."). The rejection of even viable and reasonable alternatives, after an appropriate evaluation, is not arbitrary and capricious. *See Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 177 (5th Cir. 2000).

The EA in this case noted that "the area under consideration was identified in a preliminary study by the Texas Water Plan as an area with the potential for development as a reservoir . . . ." It also noted that the City was considering a feasibility study of the reservoir. It analyzed the effects of three different alternatives (no action, a larger refuge, and a smaller refuge) along multiple lines such as climate and air quality, water resources, vegetation, land use, and cultural resources. In each instance, the EA acknowledged and attempted to analyze the effect the alternative would have on the reservoir proposal. The EA also analyzed the cumulative impact of the refuge in conjunction with other "past, present, and reasonably foreseeable future actions," including the reservoir.

Appellants argue that FWS was required to consider an alternative that would allow the refuge and the reservoir to coexist. In the EA, however, FWS noted that it was unable to evaluate fully any

such dual proposal, since plans for the reservoir were "speculative in the short-term, . . . not definitive in scope or purpose, and . . . far beyond the planning horizon for the refuge proposal (i.e., 20 years)." Additionally, after several weeks of consultation between staff at FWS, the City, and TWDB, a TWDB biologist admitted to the director of TWDB that "an alternative site that is equal to or bigger and/or better than the North Neches site has not yet been identified." The director echoed this assessment in a letter to FWS. Only after the closure of the public comment period and the drafting of the FONSI did FWS receive a proposal for alternative refuge sites. The alternatives included four other sites that Appellants claimed were of greater environmental value, since there was more bottomland hardwood extant at these sites. Each of these alternatives, however, envisioned building the Fastrill Reservoir and the resulting inundation of the Upper Neches area, with destruction of vegetation in that region. The record reveals no alternative that allowed construction of the reservoir *and* served FWS' goal of preserving the bottomlands and wetlands of the Upper Neches. Under the circumstances, and especially given that FWS concluded that the project had no significant environmental impact, *see Sierra Club*, 38 F.3d at 803, this range of alternatives was reasonable.

2. Failure to Consider Impacts

An EA must analyze both the direct and indirect effects of the proposed action that are "reasonably foreseeable," 42 U.S.C. § 4332(C)(ii); 40 C.F.R. §§ 1502.16(a) & (b); 40 C.F.R. § 1508.7, which we have defined as effects that are "sufficiently likely to occur

that a person of ordinary prudence would take [them] into account in reaching a decision." *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005). "Reasonable foreseeability" does not include "highly speculative harms" that "distort[ ] the decision making process" by emphasizing consequences beyond those of "greatest concern to the public and of greatest relevance to the agency's decision." *Robertson*, 490 U.S. at 355-56 (internal quotation marks and citations omitted). "[A] 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. Rather, a plaintiff mounting a NEPA challenge must establish that an alleged effect will ensue as a 'proximate cause,' in the sense meant by tort law, of the proposed agency action." *City of Shoreacres*, 420 F.3d at 452.

Appellants argue that FWS was required to analyze the effect of establishing the refuge on the City's water supply and urban planning process, given projected population growth. The cases cited by Appellants are inapposite, however, since they concern the effect of federal actions on *existing* water sources, not proposed water sources. *See Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985) (effect of port development runoff); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975) (effect of industrial development runoff); *California v. Dep't of Transp.*, 260 F. Supp. 2d 969 (N.D. Cal. 2003) (effect of airport construction); *Simmans v. Grant*, 370 F. Supp. 5 (S.D. Tex. 1974) (effect of eliminating water source). Plaintiffs do not cite to any authority for the proposition that an agency must account for the effects on a municipal water supply of precluding a proposed but as-yet-

nonexistent water source.

Further, the effects of establishing the refuge, and thus precluding the reservoir, are highly speculative and cannot be shown to be the proximate cause of future water shortages in Dallas. The City and TWDB never committed to constructing the reservoir and may never have done so, or may have constructed a reservoir at another site. Besides including it in periodically updated planning documents, the City and TWDB have never taken any concrete steps toward constructing the reservoir, such as seeking permits, acquiring property, or commencing any of the hydrological, fiscal, or environmental studies necessary to a major public works project. In fact, the City and TWDB have never even settled upon the exact position of the dam or footprint of the reservoir. Thus, the City and TWDB have never identified the precise role the reservoir–even if constructed and tapped in 2060–will play in supplying the region's future water needs. Further, the City argues that water shortages in the region will begin as early as 2010, yet the reservoir would not be tapped earlier than 2060. Given the uncertainty over whether the reservoir will be constructed and its impact on water supplies, and the long time frame for the project, the effects of establishing the refuge on water supplies are not concrete enough, nor closely enough related to the federal action, to require that they be included in the EA.

3. Reliance on Old Data

Appellants argue that FWS relied upon old data in its EA. Properly analyzing the risks of an action requires an agency to use updated information or

data; reliance on out-of-date or incomplete information may render the analysis of effects speculative and uncertain, warranting the preparation of an EIS. *See Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Service*, 373 F. Supp. 2d 1069, 1081 (E.D. Cal. 2004). In this case much of the data in the EA was lifted from the earlier EA prepared in 1988. The City and TWDB note that there has been degradation of the site and that a significant portion of the Upper Neches bottomland hardwoods have been cleared. However, the City and TWDB have not shown that this information was so flawed that it precluded assessment of reasonably foreseeable impacts. Nor is it clear how, in this case, additional information as to environmental degradation of the Upper Neches would cause FWS to conclude it should leave the site unprotected. In this sense, the instant case differs from those cited by Appellants, where additional or updated information was needed before a reasoned decision could be made as to whether to intrude on a site. *See, e.g.*, *The Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (additional information on animal habitat needed before timber harvest could commence)[1]; *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) (additional information on trout habitat needed before logging could commence), *overruled on different grounds*, *The Lands Council v. McNair*, 537 F.3d 981, 997 (9th Cir. 2008); *Klamath-Siskiyou Wildlands Ctr.*, 373 F. Supp. 2d at 1081 (additional information on owl

[1] *Lands Council* also differs from the instant case in that it involved an EIS, which is by design a more comprehensive document than an EA.

population needed before logging could commence).

Undoubtedly, were a plaintiff to show that a site had become so degraded–for example, by substantial clearcutting of the bottomland hardwoods such that it would not support migrating waterfowl even if protected–such a showing may well render the decision to rely on older data arbitrary within the meaning of NEPA. No such showing has been made in this instance. Here, the use of older data in an EA–by definition a "rough cut, low-budget" assessment of environmental impacts on the way to determining whether an EIS is necessary, *see Sabine River*, 951 F.2d at 677–cannot be said to be unreasonable. Nor does the use of this data in this instance support forcing the agency to engage in a process likely, because of its lengthy timeline, to permit further environmental degradation of the site before a decision is reached.

4. The FWS Decision Making Process

Finally, the City and TWDB also argue that the decision making process FWS engaged in was a sham. Appellants point to several flaws: FWS's choice of a 20-year project horizon for analysis of impacts, its failure to coordinate with local and state planning agencies in violation of CEQ regulations, and its failure to publish a "final" EA. The record reveals that FWS engaged in an extensive process of public education and public comment and even worked with officials from the City and TWDB to identify an alternative site that would allow the refuge and the reservoir to coexist. Emails between various FWS officials reveal nothing more than an appropriate advocacy for a favored agency alternative. In arguing that FWS was required to

publish a "final" EA, Appellants cite only to non-binding internal policy memos and not to any binding regulation or statute. Appellants' assertion that FWS abused its discretion by failing to "coordinate" with the local, regional, and state water planning process falls short, since neither NEPA nor any of the other statutes the City or TWDB cite require an agency to insinuate itself into state planning processes in the manner suggested. Finally, Appellants fail to show that FWS's 20-year planning horizon was arbitrary and capricious under the circumstances. As the district court noted, "FWS must set some kind of time frame for its evaluations; it cannot have an interminable planning period." *City of Dallas, Tex. v. Hall*, 2008 WL 2622809, at *14 n.10 (N.D. Tex. June 30, 2008).

B. Requirement of an EIS

In arguing that an EIS was required, Appellants attempt to distinguish this case from *Sabine River*. In that case, strikingly similar to the present one, FWS set an acquisition boundary for a wildlife refuge on 3,800 acres in East Texas, and accepted a negative, no-development easement from a landowner inside the acquisition boundary. *See Sabine River*, 951 F.2d at 674-76. The designation precluded the construction of a proposed reservoir. *Id.* at 673. The reservoir was in the preliminary planning stage, and the state agency with jurisdiction over it had "obtained none of the necessary federal and state permits, had secured no funding, and had not yet entered into any firm contracts for the 300 thousand plus acre feet of water that the reservoir would generate each year." *Id.* We concluded that "the acquisition of a negative

easement which by its terms prohibits any change in the *status quo* does not amount to 'major Federal action[ ] significantly affecting the quality of the human environment.' . . . The acquisition of a negative easement which prohibits development does not result in the requisite 'change' to the physical environment." *Id.* at 679-80 (citations omitted). The acceptance of such an easement is "tantamount to inaction," and thus the acceptance "did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS." *Id.* at 680. In the instant case, the district court properly set forth the factors to consider in applying *Sabine River*: whether the agency action (1) precludes any development of the land, (2) changes the character or function of the land, and (3) prohibits any change in the *status quo* of the land. *City of Dallas, Tex.*, 2008 WL 2622809 at *5.

The City argues that three independent authorities dictate that an EIS was required in this instance: FWS's own NEPA guidelines, the NEPA implementing regulations issued by the U.S. Department of the Interior ("DOI"), and the NEPA implementing regulations issued by the Council on Environmental Quality ("CEQ"). The FWS guidelines include a number of criteria to assist the agency in determining whether an EIS is needed. Among these are "increased safety or health hazards," 550 FW 3.3(B)(2)(e), and "[a]dverse effects on municipal, industrial, or agricultural water supply or quality . . . ," *id.* at 3.3(B)(2)(i). The City points to these guidelines and argues that an EIS is required to weigh adequately the health and water supply effects of not building the reservoir. But these guidelines have no binding force. *See Coliseum*

Square Ass'n, Inc. v. Jackson, 465 F.3d 215, 229 (5th Cir. 2005) ("Generally, to be legally binding on an agency, its own publications must have been 'promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.'") (citation omitted). When agency publications have not been promulgated pursuant to a specific grant of statutory authority, an agency's decision to analyze impacts by other methods is not automatically arbitrary and capricious. *Id.* at 230. These guidelines were not promulgated pursuant to law. Further, by their own terms, they are meant to *assist* in determining whether an EIS is necessary, not *dictate* when an EIS is necessary, and carefully note that whether any of the criteria triggers the need for an EIS depends in each instance on "the severity and duration of effects." FW550 3.3(B)(2).

The DOI regulations the City points to are binding on the agency, but they do not mandate the preparation of an EIS in this case. In the regulations, among the "Major Actions Normally Requiring an EIS" are "major new refuge system units . . . which involve substantive conflicts over existing State and local land use [or] significant controversy over the environmental effects of the proposal." 62 Fed. Reg. 2375, 2382. The City argues that the refuge meets both these criteria. But by their own terms, the regulations "normally" require preparation of an EIS but do not dictate preparation in each case. Further, the regulations clearly envision that when, pursuant to an EA, the agency determines that an action will have no major environmental impacts, an EIS is not required even when the action otherwise meets the criteria. *Id.* In

this case, after preparing an EA the agency made a reasoned decision that there were no significant environmental effects.

More importantly, by their own terms the regulations only envision preparation of an EIS when there is a conflict with "existing" State and local land use or where there is "significant" controversy over environmental effects. In this case, while a feasibility study has been completed, the City and TWDB have taken no concrete steps to develop the reservoir (such as applying for permits), much less put any land to use. The development of an acquisition boundary does not conflict with existing State and local use, but merely with a potential future use. Further, the City and TWDB have been unable to show with any specificity the effects of setting the acquisition boundary. A controversy such as this one--over the highly speculative, uncertain effects of not building a particular reservoir--cannot be "significant" within the meaning of both the regulations and NEPA.

Similarly, while the CEQ regulations that the City points to are binding on federal agencies, *see Fritiofson v. Alexander*, 772 F.2d 1225, 1236 (5th Cir. 1985), they do not mandate the preparation of an EIS in this case. The regulations merely require an agency to determine whether an action is one that normally requires an EIS. *See* 40 C.F.R. § 1501.4(a). If the agency determines that the action does not normally require an EIS, it then prepares an EA and makes a finding as to whether the proposed action has significant environmental impacts. *Id.* at 1501.4(b). In this case, as described above, FWS properly prepared an EA and made a FONSI, as envisioned by the CEQ regulations.

TWDB also argues that the instant case is distinguishable from *Sabine River* because the refuge designation in this case will cause changes in the physical environment. As noted in the EA, FWS envisions removing non-native tree species in the refuge and reintroducing native hardwood and evergreen species. TWDB argues that this distinguishes the case from *Sabine River*, where there was no evidence that the refuge site would be changed in any way by the acceptance of an easement. *See Sabine River Auth. v. U.S. Dep't of the Interior*, 745 F. Supp. 388, 394 (E.D. Tex. 1990). However, as the district court noted in its order denying Appellants' motion for partial summary judgment, the action at issue here is the establishment of an acquisition boundary for the refuge. The establishment of that boundary does not effect any change in the physical environment, but merely authorizes the purchase of property from willing buyers or the acceptance of conservation easements. Once sufficient land is acquired, FWS will be required to comply with NEPA in formulating a Comprehensive Conservation Plan to guide refuge forest management. If changes in the physical environment are proposed in that plan, an EIS may be required. But the present federal action will have no significant physical effects such that an EIS is required.

As in *Sabine River*, where the acceptance of a negative, non-development easement was "tantamount to inaction," *Sabine River*, 951 F.2d at 680, setting an acquisition boundary for the refuge does not effect a change in the use or character of land or in the physical environment. Thus, it is not a "major Federal action[] significantly affecting the

quality of the human environment," 42 U.S.C. § 4332(2), and no EIS is necessary under the requirements of NEPA.

C. Tenth Amendment Claims

Finally, Appellants argue that the establishment of the refuge is unconstitutional because it impermissibly intrudes on state sovereignty and violates the Property[2] and Necessary and Proper Clauses.[3] Before ruling we must determine precisely what, if any, issues are properly before us. In its amended complaint, the City alleged that there was not a sufficient nexus between the agency's action and interstate commerce, and that FWS violated the City's Tenth Amendment right to secure sufficient water supplies for future residents. In its brief before the district court, however, the City conceded that it could not challenge the constitutionality of the statutes allowing for acquisition of property. The City's brief also did not argue a constitutional right to secure water supplies, which the district court nonetheless characterized as "a spurious argument without legal basis." *City of Dallas, Tex. v. Hall*, 2007 WL 3125311, at *11 (N.D. Tex. October 24, 2007). Rather, the City asserted that FWS exceeded its authority under the Tenth Amendment when it established the acquisition boundary and accepted the conservation easement, because it did so for the purpose of commandeering the state's water planning process and thwarting the reservoir. Because these were not the allegations pleaded in the amended complaint, the district court declined to

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[2] U.S. CONST. art. 4, § 3, cl. 2.

[3] U.S. CONST. art. 1, § 8, cl. 18.

consider them on the motion to dismiss for failure to state a claim. The allegations in the amended complaint, not having been appealed, are waived.

In its brief before this court, the City revises its constitutional argument. In this iteration, the City argues that FWS, by establishing the refuge, has unconstitutionally invaded a traditional area of state sovereignty–water and land use planning–without clear authorization from Congress. Additionally, it argues that establishing the refuge violates the Tenth Amendment by running afoul of the Property and Necessary and Proper Clauses. These arguments bear only a passing resemblance to the City's arguments on the motion to dismiss, and none at all to its arguments in the amended complaint. Accordingly, these arguments are not properly presented and we decline to consider them. *See Singleton v. Wuff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Fed. Deposit Ins. Corp. v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994) ("[I]f a litigant desires to preserve an argument for appeal, the litigant must press and not merely intimate the argument during the proceedings before the district court. If an argument is not raised to such a degree that the district court has an opportunity to rule on it, we will not address it on appeal.").

III. CONCLUSION

For the foregoing reasons, we AFFIRM the decisions of the district court.

Filed June 30, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CITY OF DALLAS, TEXAS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
H. DALE HALL et al.,	§	CIVIL ACTION NO.
	§	
Defendants.	§	3:07-CV-0060-P
	§	
	§	
	§	Consolidated with:
THE TEXAS WATER DEVELOPMENT BOARD,	§	
	§	CIVIL ACTION NO.
Plaintiff,	§	
	§	3:07-CV-0213-P
v.	§	
	§	
THE UNITED STATES DEPARTMENT OF THE INTERIOR et al.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Now before the Court are (1) the City of Dallas's Motion for Partial Summary Judgment, filed January 15, 2008; (2) the Federal Defendants' Cross-Motion for Partial Summary Judgment Concerning City of Dallas's NEPA Claims, filed February 15, 2008; (3) Plaintiff Texas Water Development Board's Motion for Partial Summary Judgment, filed January 15, 2008; (4) the Federal Defendants' Cross-Motion for Partial Summary Judgment Concerning the Texas Water Development Board's NEPA Claims, filed February 15, 2008; (5) the Federal Defendants' Motion to Strike Plaintiffs' Extra-Record Materials, filed February 15, 2008; (6) the Texas Conservation Alliance's Motion for Leave to File Amicus Brief, filed February 15, 2008; (7) Friends of the Neches River's and Houston Audubon Society's Motion for Leave to File a Letter in Support of Texas Conservation Alliance's Amicus Brief, filed March 7, 2008; (8) Texas Water Conservation Association's Motion for Leave to File Amicus Brief in Support of Plaintiffs' Motions for Partial Summary Judgment, filed April 7, 2008.

DISCUSSION

The City of Dallas (the "City") and the Texas Water Development Board (the "TWDB" or the "State")[1] (collectively, "Plaintiffs") have filed these

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[1] The TWDB is responsible for administering a comprehensive statewide planning process intended to develop, manage, and conserve the water resources of the State of Texas. *See* Tex. Water Code § 16.051(a) (Vernon 2007). The State of Texas's regional planning groups report to the TWDB. The City of Dallas is Region C.

consolidated lawsuits against the Federal Defendants[2] ("Defendants") seeking reversal of the United States Fish and Wildlife Service's ("FWS") decision to establish the Neches River National Wildlife Refuge ("Refuge") without preparing an Environmental Impact Statement or an adequate Environmental Assessment as required by the National Environmental Policy Act.

On June 11, 2006, FWS designated a 25,281-acre site within Anderson and Cherokee Counties, Texas as the Neches River National Wildlife Refuge. Plaintiffs want to use the same land on the Upper Neches River for development of a reservoir to serve the future water needs of Dallas residents and other customers. This proposed reservoir is known as the Fastrill Reservoir ("Reservoir"). Defendants' decision to establish the Refuge on this land prompted Plaintiffs to take legal action. Plaintiffs allege that FWS's administrative decision to establish the Refuge was plagued with procedural flaws and statutory violations.

A. National Environmental Policy Act.

The National Environmental Policy Act of 1969 ("NEPA") was established to ensure that federal agencies carefully consider the environmental impacts of their projects and make information about those impacts available to the public. *See* 42

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[2] The Federal Defendants include Defendant H. Dale Hall, in his official capacity as Director of the United States Fish and Wildlife Service; Dick Kempthorne, in his official capacity as the Secretary of the United States Department of the Interior; Benjamin N. Tuggle, in his official capacity as the Regional Director of the Southwest Region (Region 2) of the United States Fish and Wildlife Service; and the United States Department of the Interior.

U.S.C. §§ 4321-70(d) (1982); *Spiller v. White*, 352 F.3d 235, 237 (5th Cir. 2003). NEPA requires federal agencies to prepare a detailed Environmental Impact Statement ("EIS") for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). NEPA does not mandate particular results. It imposes procedural requirements on federal agencies by requiring them to take a "hard look" at the environmental impact of their actions. *Sabine River Authority v. U.S. Dept of Interior*, 951 F.2d 669, 676 (5th Cir. 1992); *see also Coliseum Square Ass'n., Inc. v. Jackson*, 465 F.3d 215, 223 (5th Cir. 2006).

NEPA requires a federal agency undertaking an action to determine whether its proposal requires an EIS. To make this determination, an agency must first prepare a more limited Environmental Assessment ("EA"), which is a concise public document that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS. *See* 40 C.F.R. §§ 1501.4(b), 1508.9(a). If the agency determines based on the EA that no EIS is needed because the action would not significantly affect the environment, it must issue a "finding of no significant impact" ("FONSI"), which briefly presents the reasons why the proposed agency action will not have a significant impact on the human environment. *See* 40 C.F.R. §§ 1501.4(e), 1508.13. Otherwise, the agency must prepare an EIS.

Plaintiffs contend that FWS violated its NEPA obligation by failing to prepare an EIS or an adequate EA with respect to its decision to establish the Refuge. First, Plaintiffs contend that Defendants were required to prepare an EIS because the Refuge

decision was a "major federal action. . . significantly affecting the quality of the human environment." Second, Plaintiffs contend the EA was inadequate because FWS failed to provide adequate evidence and analysis of the indirect impacts of the Refuge designation and failed to consider alternative refuge sites. Third, Plaintiffs allege that FWS failed to take a "hard look" at the environmental consequences of its decision, as illustrated by its decisions to rely on an obsolete study and ignore current data. Fourth, Plaintiffs accuse FWS of violating NEPA by failing to cooperate with state and local officials.

B. Standard of Review.

An aggrieved party challenging an agency's decision that an EIS is not required or challenging the adequacy of an EA may assert its claims in federal court under the Administrative Procedures Act. *See* 5 U.S.C. § 702. The court reviews these agency decisions under the highly deferential "arbitrary and capricious" standard. *See Sabine River*, 951 F.2d at 677-78. When applying this standard, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Gulf Restoration Network v. U.S. Dep't of Transp.*, 452 F.3d 362, 368 (5th Cir. 2006).

This Court cannot reconsider anew the facts leading to the establishment of the Refuge or weigh the evidence supporting or contradicting FWS's decision. This Court may only evaluate whether FWS's decision had evidentiary support based on the administrative record at the time the it was made.

Whether or not the Court would have decided similarly is immaterial, so long as the agency considered all relevant factors and had evidence supporting its decision. Thus, Plaintiffs' burden in this case is to show that Defendants had no evidence to support the decision not to produce an EIS or Defendants disregarded or ignored a factor required in conducting the EA. *See Brenham Cmty. Prot. Ass'n v. U.S. Dep't of Agric.*, 893 F. Supp. 652, 657-58 (W.D. Tex. 1995). This Court "must look at the decision not as a chemist, biologist, or statistician that [it is] qualified neither by training nor experience to be, but as a reviewing court exercising [its] narrowly defined duty of holding agencies to certain minimal standards of rationality." *Gulf Restoration*, 452 F.3d at 368 (internal quotation marks omitted).

C. **Amicus Briefs.**

Three organizations move for leave from the Court to present their perspectives on these issues.

1. Texas Conservation Alliance.

The Texas Conservation Alliance, which is a conservation organization that works to protect native wildlife habitat and address environmental problems, moves for leave to file an amicus brief which it believes "will bring to this case another perspective, one not shared by the parties to this case." (Mot. for Leave at 2.) The Court hereby GRANTS the Texas Conservation Alliance's motion and instructs the Clerk's Office to file its accompanying amicus brief [Docket No. 106-3].

In its amicus brief, the Texas Conservation Alliance reiterates FWS's *Sabine River* arguments

that establishment of the Refuge maintains the status quo and there is no causal relationship between establishment of the Refuge and risk of water shortage. (*See infra.*) The brief goes on to describe the value of the Refuge as a habitat for wildlife, for public recreation, and for preserving the environment. The brief also gives chronological descriptions of the Refuge planning and the Reservoir planning.

2. Friends of the Neches River and Houston Audobon Society's Motion for Leave to File a Letter in Support of Texas Conservation Alliance's Amicus Brief.

Friends of the Neches River is a conservation organization that was formed for the specific purpose of protecting the Neches River and its bottomland forests. Houston Audobon Society is a non-profit organization that promotes the conservation and appreciation of bird and wildlife habitats. Both organizations support establishment of the Refuge and formally move to file a letter expressing their support of the Texas Conservation Alliance's brief and adopting its amicus brief as their own. The Court hereby GRANTS the motion and instructs the Clerk's Office to file their accompanying letter of support [Docket No. 111-2].

3. Texas Water Conservation Association's Motion for Leave to File Amicus Brief in Support of Plaintiffs' Motions for Partial Summary Judgment.

The Texas Water Conservation Association ("TWCA") is a statewide association of governmental and private entities that are active and interested in

long-term provision of safe and adequate water resources. TWCA maintains that its amicus brief will provide another viewpoint not represented by the parties in this case. The Court hereby GRANTS the Texas Water Conservation Association's motion and instructs the Clerk's Office to file its accompanying amicus brief [Docket No. 123-2].

In its amicus brief, the TWCA maintains that the Administrative Record ("Record") reveals that the NEPA process conducted by FWS was cynically manipulated and unobjective. Despite its assurance that "the purpose of [its] amicus brief is not to repeat, rehash, or oppose the precise legal arguments made by the parties," the amicus brief goes on to reiterate the arguments made by Plaintiffs: (1) that FWS failed to take a hard look at the environmental consequences of its action; (2) that FWS was biased and manipulative in conducting its NEPA analysis; and (3) that FWS did not adequately consider alternatives. The amicus brief also includes a chronological timeline of events. (Amicus Br. at 3-7.)

D. **Failure to Prepare an Environmental Impact Statement (EIS).**

Both Plaintiffs and Defendants move for summary judgment on the issue of whether FWS was required to prepare an EIS in this case. The City argues that (1) FWS's own guidelines mandate preparation of an EIS; (2) the Department of Interior manual requires FWS to prepare an EIS; and (3) NEPA requires preparation of an EIS because the Refuge may have significant effects on the environment. The State argues that (1) establishment of the Refuge was a "major federal

action" and (2) establishment of the Refuge would have significant regional socio-economic effects and significant indirect effects. Defendants argue that the Fifth Circuit's decision in *Sabine River Authority v. United States Department of the Interior*, 951 F.2d 669 (5th Cir. 1992) governs this case and mandates a ruling in their favor.

1. The *Sabine River* Case.

In *Sabine River* — a case strikingly similar to this one — the Fifth Circuit held that FWS was not required to prepare an EIS with regard to its decision to accept a conservation easement on 3800 acres of land in East Texas even though acquisition of the easement prevented the plaintiff from constructing a water reservoir on the same land. Like this case, *Sabine River* involved an effort by FWS to preserve land for the sake of protecting wildlife habitats and populations. Like this case, the agency action in *Sabine River* foreclosed the plaintiff from establishing a reservoir on the same land. Like this case, the *Sabine River* plaintiff had "given serious consideration to using [the] land to construct" a reservoir. *Id.* at 673. Like this case, the *Sabine River* plaintiff's "plans for the construction of the reservoir, aimed at satisfying the anticipated need for additional water over the next forty years [in our case, 50 years], were still in the preliminary stages: [it] had obtained none of the necessary federal and state permits, had secured no funding, and had not yet entered into any firm contracts for the" water that the reservoir would generate each year. *Id.* Like this case, the *Sabine River* plaintiff filed suit in federal court, alleging that the federal agency's decision interfered with the plaintiff's long-

term plan to construct a reservoir, which would ensure that the state's water supply would not be placed in jeopardy in the calendar year 2030 (in this case, 2060 [TWDB 562]). And like this case, the *Sabine River* plaintiff invoked NEPA and argued that FWS's action constituted a "major federal action significantly affecting the quality of the human environment," thereby necessitating preparation of an EIS. *Id.*

Defendants argue that *Sabine River* controls the outcome of this case by presuming this case is indistinguishable from it. Defendants maintain that Plaintiffs' arguments seeking to distinguish this case from *Sabine River* are foreclosed by *Sabine River* which controls the outcome of this case. (Defs.' Cross-Mot. for Summ. J. on State NEPA Claims at 16.) As the State points out, this argument is circular: it assumes that *Sabine River* is not distinguishable, then uses that precedent to foreclose the argument that it is distinguishable. (State Resp. at 3.)

Sabine River requires the Court to conduct an analysis of the facts of each particular case, as governed by the law set forth therein. In order for the Court to determine whether the agency action at issue rises to the level of a major federal action significantly affecting the quality of the human environment under *Sabine River*, the Court may look at whether the agency action at issue (1) precludes any development of the land, (2) changes the character or function of the land, and (3) prohibits any change in the status quo of the land. *See Sabine River*, 951 F.2d at 680. To do this, the Court must decipher from the Administrative Record the scope of the agency action taken and whether the agency

action causes a significant change to the land. The Court must also analyze the socio-economic impact of the Refuge decision on the Reservoir and on regional and state water planning generally, and whether the indirect effects of the Refuge are significant within the meaning of NEPA. *See id.*

a. Direct Effect on Physical Environment.

In *Sabine River* the district and circuit courts held that FWS's act of acquiring the easement "'d[id] not alter the environmental status quo; it does not cause any change in the physical environment. Indeed, the purpose of the [action] [wa]s to foreclose *any* change in the physical environment of a particular wetland site.'" *Sabine River*, 951 F.2d at 679 (quoting *Sabine River*, 745 F. Supp. 388, 394 (E.D. Tex. 1990).). The courts also held there was no causal connection between the federal agency action and the alleged change to the physical environment. *See Sabine River*, 745 F. Supp. at 394-95; *Sabine River*, 951 F.2d at 680. The Fifth Circuit noted that NEPA does not require a federal agency to prepare an EIS in order to "leave nature alone." *Sabine River*, 951 F.2d at 679. "NEPA may require an EIS whenever a reservoir is built, but NEPA does not require preparation of an EIS whenever a reservoir is not built." *Id.* The court reasoned that the agency action "did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS." *Id.* The court concluded that an agency action that "precludes any development of the land whatsoever," that does not "change [ ] the character or function of the land," and that "by its terms prohibits any change in the status quo" does

not amount to a "'major Federal action[] significantly affecting the quality of the human environment.'" *Id.* at 679-80 (quoting 42 U.S.C. § 4332(2)(C) (alteration in *Sabine River*).

In this case, Defendants characterize the agency action as the "establishment of an acquisition boundary for a refuge," which they argue is analogous to *Sabine River*'s acquisition of the conservation easement because it does not alter the status quo of the land. (Defs.' Mot. for Summ. J. on State NEPA Claims at 18; AR 1963 [FONSI].) The City argues that FWS's action is distinguishable from the *Sabine River* action because the agency action in this case was to establish a refuge and establishment of an actual refuge "'normally require[s] the preparation of an EIS.'" *Sabine River*, 745 F. Supp. at 400 (quoting Dep't of Interior Manual, 516 DM 6, App. 1, 1.3A(1)). This case is arguably distinguishable because the negative easement in *Sabine River* prohibited any change in the physical environment, whereas here the "land use within the [R]efuge boundaries will be in flux." (City Resp. at 2.)[3]

According to the FONSI, FWS's agency action resulted in the "establish[ment] of an [sic] land

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[3] To support its position that this federal action will result in change to the physical environment, the State points to the EA which states that FWS "would strive to replace introduced loblolly pine or slash pine species with native hardwoods or evergreens." (State Mot. at 17 (citing AR 1194).) This argument lacks merit because this is a management issue, not an establishment issue and management of the Refuge will be addressed comprehensively in the Comprehensive Conservation Plan and in accordance with NEPA. Additionally, these changes will add more of what is sought to be protected — bottomland hardwoods.

acquisition boundary." (AR 1963.) It allows for "establishment of the Neches River National Wildlife Refuge" which allows FWS to make land purchases "in fee and easement interests from willing sellers and/or donors, and in coordination with the affected public." (AR 1961.) The "national wildlife refuge will only exist after an interest in land is acquired by the United States within an approved boundary." (AR 1963.) Eventually, FWS will prepare a formal Comprehensive Conservation Plan ("CCP") that will provide detail about Refuge management, with input from the public and in accordance with NEPA. (AR 1973-81.)

The fact that this case involves establishment of a 25,281-acre refuge, not a 3800-acre non-development easement is immaterial. The fact that establishment of the Refuge will prevent the land from being sold, subdivided, or cleared and used for a reservoir, pastures, tree farms, oil and gas drilling, natural gas pipelines, and residences does not mean that establishment of the Refuge alters the status quo. (City Mot. at 23-32.) The status quo is the condition of the land as it is now. Establishment of the Refuge will not alter the condition of the land as it is today — in fact, it will effect no change in the status quo. Establishment of the Refuge boundary will not result in a change to the physical environment and in fact, preserves the land at issue.[4]

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[4] The City argues this is its "*only* opportunity to challenge FWS's NEPA analysis for establishment of the Refuge" and objects to FWS's explanation that FWS will be required in the future to conduct NEPA analyses in conjunction with environmental impacts that may occur due to management of the Refuge. (City Reply at 6.) The City's objection does not

b. Indirect Effects on Environment.

Plaintiffs argue that FWS violated NEPA by failing to address the Refuge's indirect effects on Dallas's water supply, the Dallas economy, and Dallas and Texas's future water planning. (City Mot. at 39; State Mot. at 12, 14-15.) Defendants maintain that NEPA does not require FWS to evaluate the Refuge's potential impact on the City's future water supply or water-planning process for two reasons: (1) those impacts would not be the proximate result of the agency action, and (2) they would be too remote and speculative to determine. (Defs.' Resp. to City Mot. at 34.)

An agency must review the direct, indirect, and cumulative impacts of the proposed action when deciding whether or not to prepare an EIS.[5] *See generally* 40 C.F.R. § 1508.9(b).[6] NEPA does not require an exhaustive, detailed discussion of impacts in an EA. *See* Joan E. Drake, Paper, *The NEPA*

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make the City's case for an EIS any more persuasive and is immaterial to the Court's decision.

[5] "Direct effects" are caused by the action and occur at the same time and place. "Indirect effects" are caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable. "Cumulative impacts" result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. *See* 40 C.F.R. §§ 1508.8(b), 1508.7.

[6] 40 C.F.R. 1508.9(b) ("[An] Environmental Assessment shall include "*brief* discussions of . . . the environmental impacts of the proposed action." (emphasis added); *id.* § 1508.8 (environmental impacts include direct and indirect effects of the proposed action); *id.* § 1508.27 (inquiry into whether action has "significant" effect must include cumulative impacts). NEPA uses the terms "effects" and "impacts" interchangeably. *See* 40 C.F.R. § 1508.8.

Process - What Do We Need To Do and When?, 2006 Rocky Mountain Mineral Law Found. Paper 3 (2006). An EA must show the agency considered relevant factors and made a reasoned evaluation. *See Utah Shared Access Alliance v. U.S. Forest Serv*, 288 F.3d 1205, 1213 (10th Cir. 2002). NEPA requires agencies to focus on reasonably-foreseeable impacts "rather than distorting the sum process by overemphasizing highly speculative harms." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989). NEPA requires FWS to take into account those effects that "are *caused* by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *City of Shoreacres v. Waterworth*, 420 F.3d 440, 452 (5th Cir. 2005) (internal quotation marks omitted). "A 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." *Id.* (internal quotation marks omitted). "Rather, a plaintiff mounting a NEPA challenge must establish that an alleged effect will ensue as a 'proximate cause,' in the sense meant by tort law, of the proposed agency action." *Id.*

Sabine River requires a court to evaluate whether the agency action had an indirect adverse impact on the environment, such as on the water supply and planning, the local economy, or the population. *See Sabine River*, 951 F.2d at 680. In *Sabine River*, the court held that aside from the absence of any change to the physical environment, it doubted whether the adverse impact on water quality and supply could be precisely attributed to FWS's acquisition of the easement. *See id.* The court believed any link between acquisition of the

easement and adverse impact on water supply was too unpredictable and speculative to be considered a significant environmental impact. *See id.*

Plaintiffs argue FWS had much more information about the effects of the Reservoir on the City's water supply than it did in *Sabine River*, thereby rendering this Reservoir project non-speculative. For example, in this case the Fastrill Reservoir was listed as a planned reservoir in two regional water plans, a potential construction date has been set, the facility and unit costs are calculated, and the economic consequences of not adopting the proposed water management strategies have been estimated. (State Resp. at 4-5.) Plaintiffs also argue that this case is distinguishable from *Sabine River* because the *Sabine River* reservoir was not listed in the state water plan on which FWS reasonably relied when conducting its EA. The State argues that because the Fastrill Reservoir was listed as a potential future reservoir site in two state water plans, FWS was aware of the need for the Reservoir and Plaintiffs' plan to construct it.

Though the water plan in *Sabine River* did not list the *Sabine River* reservoir as a planned reservoir, FWS did review the Sabine River Authority's Master Plan which contained its own water supply projections to support the conclusion that the reservoir at issue was necessary. *See Sabine River*, 745 F. Supp. at 398. The district court found that FWS "fully considered the available data on future water supply needs" of the relevant region. *Id.* at 399. This is analogous to FWS having the two Water Plans and corresponding data on future water supply needs in this case.

Plaintiffs further argue that this case is

distinguishable from *Sabine River* because here, Plaintiffs have a projected construction date for the Reservoir and have calculated facility and unit costs. Furthermore, Plaintiffs' assert that the inability to construct the Reservoir will have known and significant impacts on the region's water supply and economy as set forth in the State's 2006 Water Plan for Region C.

The flaw in the Plaintiffs' position is that these adverse effects will not be caused by establishment of the Refuge or Plaintiffs' inability to develop the Fastrill Reservoir. The drought conditions described in the State's 2006 Water for Texas Plan for Region C presume no new water supplies being developed over the next fifty years. (TWDB 280-83.) Plaintiffs do not anticipate building the Reservoir until 2050 or tapping into the Reservoir until 2060 — long after these alleged effects would be felt. (TWDB at 562.) Additionally, there are many other factors that could affect the water supply for the region that FWS cannot control or foresee, for example, the City's and the State's water planning processes, how Plaintiffs choose to address the region's future water supply needs, from where the City purchases its water, whether and to what extent the City adopts water conservation measures, and whether and when the City develops new sources of water. The Fifth Circuit has noted that "it is doubtful that an environmental effect may be considered as proximately caused by [an agency action] if that effect is directly caused by the action of another government entity over which the [agency] has no control." *Shoreacres*, 420 F.3d at 452. Establishment of the Refuge boundaries today cannot be said to be the legal and proximate cause of deficiencies in the City's water supply fifty years

from now. While it is reasonably foreseeable that establishment of the Refuge will cause the Reservoir to be thwarted, it is beyond FWS's capability and NEPA's scope to require FWS to identify all possible consequences that could be caused by the Reservoir not being built. The Court finds that the effects of FWS's action upon the City's and the State's water supplies are not within the scope of NEPA and can not form the basis of a NEPA claim.

2. Department of Interior Guidelines.

The City argues that an EIS was required pursuant to Department of Interior guidelines, which mandate preparation of an EIS when a new refuge system proposal conflicts with local land use plans. (City Mot. at 4, 20.)

The Department of Interior provides guidelines for FWS to follow when implementing NEPA. See NEPA Rev'd Implementing Procedures, 62 Fed. Ref. 2375 (Jan. 16, 1997)). These guidelines "provide general guidance for NEPA compliance" for FWS activities and list those "major actions normally requiring an environmental impact statement." *Id.* at 2376. The guidelines state that, "[m]ajor proposals establishing new refuge systems" "*when determined to be a major Federal action significantly affecting the quality of the human environment*, will normally require the preparation of an EIS." *Id.* at 2382 (emphasis added). What the City fails to mention is that establishment of a refuge requires an EIS only when the action significantly affects the quality of the human environment. Because the City has not demonstrated that establishment of this Refuge will significantly affect the human environment, no EIS was required pursuant to the Department of Interior

guidelines.

3. FWS Guidelines.

FWS has its own set of guidelines to help its staff determine whether a particular agency action will require preparation of an EIS. (City Mot. App. at 101-06.) FWS advises that certain criteria "*may* trigger the preparation of an EIS," "depending on the severity and duration of [the] effects." (City Mot. App. at 102 (emphasis added).) Despite the discretionary language of the guidelines, the City alleges that in this case, the guidelines "compel[] the preparation of an EIS." (City Mot. at 18.) Specifically, Plaintiffs argue that because the agency action (1) "expos[es] *existing or future* generations to increased safety or *health hazards*;" (2) "*conflicts* with *substantially proposed or adopted local, regional, State, interstate, or Federal land use plans or policies* that may result in adverse environmental effects;" and/or (3) has "adverse effects on *municipal*, industrial, or agricultural *water supply* or quality; or *major consumptive use* or other *long-term commitment of water*," FWS was required to conduct an EIS. (City Mot. App. at 102-03.)

The Court is not persuaded by Plaintiffs' arguments. The underpinning of the guidelines is a showing of causation; the agency action must be shown to cause adverse environmental effects. The City has not established that establishment of the Refuge will cause adverse effects to Dallas's future water supply. *See, e.g., Sabine River*, 951 F.2d at 680 ("[t]he inquiry in NEPA cases is whether the federal action at issue is 'proximately related to a *change* in the physical environment.'"). It is too tenuous an argument to say that establishment of the Refuge

boundaries will be the proximate cause of hazardous drought conditions or a shortage of water for future Dallasites. The City has not established that the Reservoir at this location is the only water source available to meet Dallas's future needs. Nor has the City established with certainty that the Reservoir would, in fact, be built; the Fastrill Reservoir was not a *substantially proposed or adopted* land use plan — planning was in its infancy — the feasibility study had not yet been finalized and the City had taken no concrete steps to construct the Reservoir, such as official authorization, funding, permitting, design studies or environmental studies. *Cf. Sabine River*, 951 F.2d at 673 (finding reservoir project was still in the preliminary stages when plaintiffs "had obtained none of the necessary federal and state permits, had secured no funding, and had not yet entered into any firm contracts for the" water that the reservoir would generate each year).[7] Therefore, the Court finds that the FWS guidelines did not mandate preparation of an EIS in this case.

For all these reasons, the Court concludes that

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[7] Plaintiffs' characterization of their "planning" as "distinctly more concrete" than the *Sabine River* reservoir is not supported by the record evidence. For example, the fact that communication may have been initiated with officials who would be involved in the process of obtaining permits for the reservoir does not mean that the application process had begun or that any permit had been obtained. In fact, initiation of discussions is a far cry from actual acquisition of permits. (*See* City Resp. at 5 (citing TWDB0595).) What the evidence indicates is that virtually no real planning had been done between 1961 and the time FWS announced its decision to establish a refuge on the land. Even preliminary planning was not initiated until 2005 — two years after FWS began taking the necessary steps to establish the Refuge.

FWS did not act arbitrarily and capriciously by deciding not to issue an EIS in this case.

E. Adequacy of the Environmental Assessment.

An EA is a "concise public document" that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI. *See* 40 C.F.R. §1508.9. "An EA is 'a rough cut, low-budget environmental impact statement that is designed to show whether a full fledged environmental impact statement — which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project — is necessary.'" *La. Crawfish Producers Ass'n - W. v. Rowan*, 463 F.3d 352, 356 (5th Cir. 2006) (quoting *Sabine River*, 951 F.2d at 677).

An EA must "include brief discussions of [1] the need for the proposal, [2] alternatives as required by section 102(2)(E), [3] the environmental impacts of the proposed action and alternatives, and [4] a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b).

The thirty-eight page EA in this case evaluates the "scope and dimensions of the proposed [refuge] boundary." (AR 1168.) The EA lists three refuge alternatives: (A) a "no action" alternative, (B) the recommended 25,281-acre configuration, and (C) a smaller and narrower 15,294-acre configuration. (AR 1174-75.) The EA acknowledges that the Fastrill Reservoir had been proposed for the Neches River and that the City had contracted for a feasibility study on its potential development. (AR 1178.) The EA does not include an alternative that discussed a Refuge/Reservoir combination. The EA explains that

FWS "considered the reservoir project speculative in the short term, and not definite in scope and purpose," accordingly, FWS could not "formally evaluate the combined or cumulative impacts or details of how the two projects might interface while not attenuating the mutual goals of each project." (AR 2971; *see also* AR 1185.) In discussing the "no action" alternative, the EA recognizes that if the Refuge is not established, the Reservoir "could eventually be built." (AR 1190, 1200.) In the other two alternative discussions, the EA notes that establishment of the Refuge would prevent development of the Reservoir. (AR 1194, 1998.)

The City argues that the EA is deficient because FWS failed to (1) assess a reasonable range of alternatives; (2) analyze many of the indirect and cumulative impacts; (3) use current information in its analysis; (4) supplement the EA and FONSI in light of new information and circumstances; (5) consider the economic impacts on the city of Dallas; and (6) coordinate and consult with State and local agencies. FWS maintains it reasonably evaluated each of these issues and appropriately issued a finding of no significant impact.

1. Consideration of a Reasonable Range of Alternatives.

NEPA mandates that the agency "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). An EA must include a reasonable range of alternatives, but NEPA does not require an agency to discuss "all proposed alternatives, no

matter what their merit." *See La. Crawfish Producers*, 463 F.3d at 356. "'[T]he range of alternatives that the [agency] must consider decreases as the environmental impact of the proposed action becomes less and less substantial.'" *Id.* at 357. "NEPA's requirement with regard to an agency's consideration of alternatives is subject to a rule of reasonableness." *Davis Mountains Trans-Pecos Heritage Ass'n v. U.S. Air Force*, 249 F. Supp. 2d 763, 793 (N.D. Tex. 2003) (Cummings, J.). The rule of reason applies to the range of alternatives considered as well as the extent the EA must discuss each alternative. *Id.* There is no need for an agency to analyze "the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective. *See Fuel Safe Wash. v. Fed. Energy Regulatory Comm'n*, 389 F.3d 1313, 1323 (10th Cir. 2004) (internal quotation marks omitted) (omission in original). Alternatives that do not accomplish the purpose of an action are not reasonable. *See Davis Mountains*. 249 F.Supp.2d at 793. Where conflicting evidence is before an agency, the agency and not the court has the discretion to accept or reject from the several sources of evidence. *See Sabine River*, 951 F.2d at 678.

Under the highly deferential standard of review the Court must use, the Court may not substitute its judgment for that of the agency, but must studiously review the record to ensure that the agency has arrived at a reasoned judgment. *See id.* at 676.

a. The Joint Refuge/Reservoir Alternative.

The City argues that FWS acted arbitrarily and capriciously by refusing to consider an alternative that would include both the Refuge and the Reservoir. FWS responds that it was not required to evaluate a joint Refuge/Reservoir alternative because such an alternative would have been speculative. The EA concludes that because the feasibility study had not yet been done and because the Reservoir project was far beyond the planning horizon for the Refuge proposal, it was too speculative to determine how the two projects might interface. (AR 1185, 1966.)

In *Sabine River*, FWS did consider in its EA the alternative of establishing a refuge in conjunction with the reservoir. *See Sabine River*, 745 F. Supp. at 399. FWS rejected that alternative because it would not prevent destruction of the wetland habitat FWS was trying to preserve. *See id.* FWS also concluded that any area set aside for refuge purposes would be of inferior quality. *See id.* This decision was supported by a Texas Parks and Wildlife report which suggested that wetland sites established in conjunction with reservoir projects are of only marginal value to the waterfowl populations. *See id.*

The Record establishes that Plaintiffs' plans for constructing the Reservoir were aimed at satisfying an anticipated need for additional water in 2060. The Reservoir would not even be constructed until 2050 and planning for its construction was in the preliminary stages. Plaintiffs had not obtained any of the necessary federal and state permits, had secured no funding, and had not yet entered into any

firm contracts for the water that the Reservoir would generate each year. The Court concludes that it was not arbitrary and capricious for FWS to conclude that a combined Refuge/Reservoir alternative would be too speculative.

b. Alternate Refuge Site.

Plaintiffs also maintain that FWS violated NEPA because it did not appropriately consider an alternate site for the Refuge. (City Mot. at 35-37.) In March 2006, FWS was presented with the draft feasibility study which outlined some preliminary alternate sites for the Refuge. (AR. 722-24.) On April 3, 2006, FWS Director Dale Hall met with the City and the Upper Neches Regional Municipal Water Authority ("UNRMWA") in Washington, D.C. to discuss co-existence of the Refuge and the Reservoir. At this meeting, the Reservoir proponents gave a presentation about the Reservoir and the City's water needs and requested that Director Hall not approve the FONSI until both Parties have an opportunity to work together to identify an alternate refuge site of equal or greater value for preservation of bottomland hardwood habitat. (AR 2077, 2128.) Director Hall agreed to postpone his decision until June 1, 2006. (AR 2067, 2076, 2154, 2210.) In the interim, the parties established a "technical/scientific team" that was comprised of an FWS representative to work with the City, its consultant HDR Engineering, Inc. ("HDR"), the UNRMWA, and the State of Texas Parks and Wildlife Department. Throughout May 2006, FWS was kept informed of the progress of the technical/scientific team. FWS was involved in phone calls, emails and meetings with members of the

technical/scientific team where the issue of alternative sites for the Refuge was discussed. (AR 2062-64, 2067, 2075-80, 2175-77, 2531-33, 2579.) According to the Texas Parks and Wildlife Department, the technical/scientific team spent considerable time mapping, researching, and discussing alternate sites, yet as of May 31, 2006, "an alternative site that is equal to or bigger and/or better than the North Neches site has not yet been identified." (AR 2051-52, TWDB 1028-29.) The alternate refuge sites had problems that made them undesirable: i.e., forest conditions, conflicts with previously identified reservoir sites, and land ownership issues. (AR 2052.) "At this point in time, there are too many unknowns regarding the appropriateness of the alternative sites. Criteria such as current forest condition and willingness of owners to sell have not been identified." (AR 2051; see AR 2052, 2531.) On June 7, 2006, HDR sent an email to FWS outlining the progress made to date, but failing to present an alternative site that is equal to or better than the Refuge site. (AR 2054-57.) FWS reviewed the email and noted it did not provide a viable alternative site. (AR 2054.) FWS continued to meet with the technical/scientific team after the FONSI had been signed and the Refuge boundaries had been established. (TWDB 982.) Even assuming there were conflicting alternate Refuge sites available, FWS had discretionary authority to establish the Refuge in its current location.

In November 2007, HDR issued a final feasibility study report ("2007 Report") that analyzed four potential alternative preservation sites in detail. In its 2007 Report, HDR detailed its research findings of land ownership, conflicts with reservoir sites,

preliminary hydrologic comparisons of the proposed Refuge and alternate sites, and land cover summaries with information on bottomland hardwood acreage. (2007 Report at 2-1.) According to Plaintiffs, much of the underlying data for the report was available to FWS before the Refuge decision was made. (State Mot. at 24.) The 2007 Report concludes that the Middle Neches River and Neches River South are of "apparent value greater than or equal to that of the" original Refuge site. (2007 Report at 4-1, 4-2.) The 2007 Report also states "there are opportunities for managed co-existence of Fastrill Reservoir and a significant portion of the planned [Refuge] for the multiple objectives of water supply and wildlife habitat management and preservation." (2007 Report at 4-1.)[8] Plaintiffs claim this evidence and these conclusions were available to FWS prior to May 31, 2006, and that these sites were better than the site chosen by FWS.

In *Sabine River*, the court stated that "where conflicting evidence is before the agency, the agency

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[8] FWS objects to and moves to strike as extra-record evidence created after the final agency decision was made the Affidavit of William F. Mullican III (TWDB Ex. 1); Affidavit of Samuel K. Vaugh (TWDB Ex. 2); Affidavit of Samuel K. Vaugh (City App. at 1-7), *Fastrill Reservoir & Bottomland Hardwood Preservation Opportunities*, HDR Engineering, Inc., Nov. 2007 ("2007 Report") (TWDB Ex. 3.). The Federal Defendants also object to Plaintiffs using their Complaints as summary judgment evidence. The Court DENIES FWS's motion to strike to the extent the data contained in the Vaugh affidavits and the 2007 Report is used for determining whether FWS took the requisite hard look at the environmental consequences of its decision. Much of the data contained therein was available to FWS or was in its possession at the time the agency decision was made. With respect to the Mullican Affidavit and the verified Complaints, the motion to strike is DENIED as MOOT.

and not the reviewing court has the discretion to accept or reject from the several sources of evidence." *Sabine River*, 951 F.2d at 678. The court may only review its decision for arbitrariness and capriciousness.

FWS had before it its own evaluation of the current site and its value for Refuge purposes. Using its own expertise in evaluating the properties of the land, FWS's Concept Plan identified the Neches River Refuge as "Priority 1" for conservation as far back as 1985. (AR 1169.) FWS staff conducted a site visit in January 2004 to evaluate the composition and condition of the land for refuge purposes. (AR 554-58.) It had evidence that no other proposed site was equal to the current site and the alternate refuge sites may have had problems that made them undesirable: *i.e.*, forest conditions, conflicts with previously identified reservoir sites, and land ownership issues. (AR 2051-53.) The fact that the area's bottomland hardwood cover is diminishing does not mean FWS was arbitrary in choosing the area for a refuge. (*See* AR 554 acknowledging deterioration of bottomland hardwoods in the region). In fact, it may be that FWS wants to preserve the bottomland hardwood cover that remains. FWS was entitled to establish the Refuge boundaries in the location it chose instead of in the areas proposed in the 2007 Report. The fact that FWS was faced with conflicting evidence does not establish that FWS acted arbitrarily or capriciously in choosing these particular Refuge boundaries over others.

Although FWS did not analyze the alternative of establishing a refuge in conjunction with the reservoir *in* the *EA*, the Record evidence establishes

that FWS did consider and reject that alternative because the Reservoir would destroy the habitat FWS was trying to preserve. *See Sabine River*, 745 F.2d at 399. The Record contains sufficient evidence to support FWS's conclusion that the Reservoir project was speculative and inconsistent with FWS's objective. FWS did not act arbitrarily and capriciously given the available data at the time of the decision and in light of the fact that establishment of the Refuge will have no significant impact on the environment. Given the deferential standard of review, the Court concludes that the FWS adequately considered alternatives and was not arbitrary or capricious in its decision to adopt Alternative B.

3. Use of Current Information in Environmental Assessment.

The City argues that FWS violated NEPA by failing to use "current information" in its EA, instead using a twenty-year-old analysis of the bottomland habitat. (City Mot. at 40-44; AR 19.)[9] The City argues the EA did not use current data and accurate scientific analysis in its discussions of the Refuge's alternatives or the Refuge's impacts on wildlife, vegetation, the environment, air, and socioeconomic conditions. (AR 1178-82, 1184, 2987.) FWS does not dispute that it relied on "certain older studies" and responds that its reliance on those older studies does not invalidate the EA. (Defs.' Resp. to City Mot. at 38.)

In this NEPA challenge, Plaintiffs must show

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[9] The twenty-year-old study to which the City refers is a 1985 FWS report entitled "Land Protection Plan for Bottomland Hardwoods, Category 3, Texas and Oklahoma."

that FWS's use of old data likely led to a flawed assessment of environmental consequences and that FWS's use of such data resulted in a decision that was arbitrary and capricious. The City contends that FWS's use of this outdated data caused FWS to overlook the fact that the area's bottomland hardwood cover has diminished from seventy-one percent to thirty-one percent since 1985. (2007 Report at 3-4.) The City presumes that the presence of waterfowl and other migratory birds would have changed in light of the diminishment of bottomland hardwoods habitat. (City Reply at 18.) FWS's own 2004 site visit noted that a portion of the land "had been partially harvested since we looked at the site in the late 1980s." (AR 554.)

It is important to remember that "the ultimate purpose of the EA is to lead to one of two findings: either that the project requires the preparation of an EIS to detail its environmental impact, or that the project will have no significant [environmental] impact." *Spiller*, 352 F.3d at 238 (internal quotation marks omitted). Only when outdated information affects an agency's ability to properly assess the environmental impacts of its action does the NEPA analysis come into question. Thus, the Court must consider whether the data used by FWS was so deficient as to lead to a flawed assessment of the environmental consequences of the Refuge and an inaccurate evaluation of alternatives. The challenging party has the burden of making this showing.

The Record evidences that FWS met with the City, the UNRMWA, and the State of Texas Parks and Wildlife Department to discuss the Refuge proposal and plans for a Reservoir. The Record

evidences that FWS evaluated the new information provided during those meetings, including the draft Feasibility Study, and decided to move forward with its approval of the Refuge proposal. (AR 2054-55, 2067.)

The City's briefing is replete with conclusions and speculation, but is lacking in detailed discussion of particular ways the new data and conclusions affect the ultimate environmental assessment. Despite spending considerable time mapping, researching and discussing alternate sites for the Refuge, Plaintiffs were unable to identify an area that was equal to or better than the Refuge site as of June 1, 2006. (AR 2052.) The City has not shown that more current data would have revealed the existence of a significant environmental impact or a different set of alternatives. Even if the alternatives set forth in the 2007 Report were considered by FWS, as stated *supra*, FWS had the discretion to decide between the conflicting evidence which it would accept. *See Sabine River*, 951 F.2d at 678. The City's repeated arguments that FWS "should have" done this, or "could have" done that is not enough to show FWS acted arbitrarily and capriciously, given the deferential standard the Court must apply.

4. Evaluation of Economic Impacts on the City of Dallas.

The City argues that FWS acted arbitrarily and capriciously by failing to adequately consider the economic impacts of the Refuge on the City of Dallas. (City Mot. at 45-46.) The City reasons "there is nothing speculative about the fact that if the refuge is established it precludes the planned reservoir." (City Reply at 23.)

While this is true, what is speculative is the likelihood that the Reservoir would have been constructed at all, and the effect that not having the Reservoir at this location would have on the City's water supply. The speculative nature of these issues has been discussed at length, *supra*. FWS was not arbitrary or capricious in concluding that establishment of the Refuge's boundaries would not have a directly ascertainable economic impact on the City or the City's water supply.

5. Coordination with State and Local Agencies.

The City argues that FWS acted arbitrarily and capriciously by "ignoring state and local concerns" and by misleading state and local agencies into believing they were engaging in cooperative consultation with FWS. (City Mot. at 46.) The City also argues FWS was under a mandatory obligation to coordinate with affected state and local governments. Plaintiffs believe FWS did not conduct its NEPA analysis in good faith; that its apparent willingness to cooperate and consider alternate sites was a sham because FWS had prejudged the issue and was unwilling to consider any other options. (State Mot. at 27-28; City Mot. at 13-15.) The State points to two statements made by FWS Director Dale Hall. (State Mot. at 27-28.) In one email dated February 2005, then-Regional Director Hall sent an email to his staff giving them a "heads up" about the proposed Reservoir in which he wrote, "it just doesn't make sense to flood out highly productive wetlands like these for a water project that has found no justified need." (AR 574.) Hall's second email, sent a month later, says "the smart way to approach this is

not to be seen as saying 'no way,' but rather emphasizing the difficulty in replacing such an important, and limited bottomland hardwood resource and that we simply don't see how that could be done through mitigation." (AR 459.) The City also cites an email from FWS's Tom Baca in March 2005 that states "even if the full [City] council votes in favor of a study for Fastrill, by the time they get a study contracted and completed, we will hopefully have received the director's approval. (Trying to be an optimist :)." (AR 1768.) The City also quotes a portion of an email from Tom Baca who wrote in April 2006 that "to agree to some compromise mitigation proposal is not only biologically unsupportable, it is unconscionable in the realm of responsibility to the local citizenry. Just between us, a total betrayal." (AR 2191.)

These emails do not vitiate the good faith or reasonableness of the NEPA analysis. According to the Record, Tom Baca was not involved in the meetings with the reservoir proponents and was not the final decision-maker with authority to approve the Refuge boundaries. In fact, in an April 2006 email to Tom Baca, another FWS official wrote that "Jim Neal [is] on the team" to review the Reservoir proponents' proposal and he "will certainly look at their proposal very objectively." (AR 2191.) Then-Regional Director Dale Hall's email excerpts show that Hall, as an FWS official, was working to promote establishment of the Refuge — which was his job to do. The Record does not establish that FWS was participating in a scheme to feign cooperation in an attempt to appear in compliance with NEPA. Director Hall was a participant in phone calls and meetings with the Reservoir proponents —

at the request of Plaintiffs and after the EA had been drafted — to give them an opportunity to have their collective voice heard on the Refuge/Reservoir issue. FWS reviewed the materials and heard the arguments. FWS representatives traveled to attend meetings about alternative sites after the FONSI and EA were issued. Though there is evidence that FWS was very committed to this Refuge project, the evidence does not establish that the agency avoided conducting a proper NEPA analysis.

Plaintiffs also argue that FWS was not cooperative because Director Hall's June 1, 2006 deadline was arbitrary. They intimate that Director Hall unreasonably hurried the scientific/technical team in their task of identifying a viable alternate refuge site. Plaintiffs argue that FWS unreasonably placed the onus of identifying an alternate site onto the Reservoir proponents.[10]

FWS officially introduced its proposal for the Refuge to the public in June 2004. This was followed by the scoping phase, during which FWS identified

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[10] The City's conclusory statement that the FWS "manufactured an arbitrary twenty-year planning horizon to avoid consideration of the reservoir in its alternatives analysis" is unsupported by the Record. (City Mot. at 36.) There is no evidence that using a twenty-year window for planning purposes is manufactured or arbitrary; nor is there evidence that FWS used that time frame to avoid consideration of the reservoir in its alternatives analysis. The State argues there is no basis in law or policy for FWS's twenty-year planning horizon for its Refuge. (State Mot. at 13-14.) The State notes that the Refuge is designed to last "essentially forever." (State Mot. at 13.) Yet FWS must set some kind of time frame for its evaluations; it cannot have an interminable planning period. Plaintiffs have not established that FWS's twenty-year planning period is arbitrary and capricious.

the important issues to be analyzed in the EA. After conducting public meetings about the proposal, the EA was drafted in March 2005. The EA and FONSI were signed by Director Dale Hall in June 2006. It bears mentioning that during this time, the City worked to apply political pressure on FWS through a letter-writing campaign and by having local and state governmental bodies pass resolutions. (AR 1852-93, 1899-1900.) The City does not appear to have spent its time and resources during this period researching the feasibility of a joint Refuge/Reservoir project, an alternate refuge site, or an alternate reservoir site. There is no evidence in the Record and no mention in the briefing of any willingness or effort on the City's part to find an alternate reservoir site. Had Plaintiffs been working diligently on any of these objectives from June 2004 through April 2006, their request for more time might seem reasonable. But to complain that more time is needed to conduct research that could have and should have been done earlier seems disingenuous. Long after the scoping period had expired, the EA was drafted, and the public hearings concluded did Plaintiffs ask for more time to conduct their own research. After waiting nearly two years, FWS gave Plaintiffs an additional two months. It ended up taking Plaintiffs another year and five months to collect and analyze the data.

Plaintiffs implicitly argue that FWS should have waited another year and five months after the EA was signed for the remainder of the data to be collected and analyzed before making its decision to establish the Refuge boundaries. NEPA does not require an agency to delay a final agency decision indefinitely while others work to develop an alternative that will meet everyone's needs. Nor does

NEPA require an agency to spend an unreasonable amount of time searching for an alternative.

NEPA does not mandate inter-agency consultation before a draft EA is prepared. Although the applicable regulations do not address the timing of inter-agency consultation in the preparation of an EA, they do provide that after preparing a draft EIS and before preparing a final EIS, the agency shall obtain the comments of other federal agencies and request the comments of appropriate state and local agencies. *See* 40 C.F.R. § 1503.1(a)(1), (2). The regulations further provide that an agency shall respond to such comments. *See id.* at § 1503.4(a). There is nothing in NEPA or the applicable regulations to suggest that the timing of consultations should be any different when an agency prepares a draft EA as opposed to a draft EIS.

FWS officially introduced its proposal for the Refuge to the public in June 2004. (AR 1971.) This phase, known as the "scoping" phase, was designed to assist FWS in identifying the "important issues to be analyzed in the environmental assessment for potential impacts of the proposal." (*Id.*) Before the proposal went public, elected officials including U.S. Senators, U.S. Congressional representatives, State Senators, State Representatives, and County Judges were notified of the proposal by letter. (*Id.*) FWS notified the affected landowners of the proposal by letter in July 2004. (*Id.*) FWS held two "scoping workshops" in July 2004 to provide information, answer questions, and elicit affected landowners' issues and concerns about the proposed Refuge. (*Id.*) FWS also notified the Texas Parks and Wildlife Department, the two County Farm Bureau

presidents, and the Texas State Railroad. (AR 1971.) FWS conducted a presentation for the East Texas Regional Water Planning Group in October 2004. (AR 1971.)

After the EA was drafted in March 2005, it was publicly circulated to public officials; affected federal, state and local agencies; conservation organizations; academic institutions; affected landowners; and others expressing interest in the Refuge. (AR 1204, 1999.) These documents underwent public review from March 1, 2005 to May 31, 2005 and public hearings were held on May 10 and 11, 2005. (AR 1999.) A Fiscal Impact Analysis was conducted and distributed to the public. (AR 1972.) Both the City and the State were invited to voice their concerns and meet with FWS during that comment period (AR 567, 816).

During the comment period, FWS recorded and responded to 1693 written comments, many of which concerned the future of the Reservoir. (AR 1999-2028.) FWS received and responded to dozens of letters from state, federal, and local officials about the Refuge and the Reservoir. (AR 1337, 1344-45, 1358-59, 1366-67.)

After FWS's then-Regional Director Dale Hall approved the EA and issued the FONSI in July 2005, City and State officials asked FWS to delay its final decision and to meet with its representatives. (AR 1854, 1859-60.) FWS accommodated these requests, and on April 3, April 20 and May 10, 2006 — long after the comment period had passed — the then-Director Hall met with City and State Reservoir proponents about the future of the Refuge and the Reservoir. (TWDB 557-74; AR 2175-77, 2531-33, 2579.) The attendees at the meetings

included representatives of the City, HDR, the UNRWA, the State, and FWS.

The Record demonstrates that FWS considered and responded to comments raised by other governmental agencies, including Plaintiffs, concerning the future of the Reservoir. The Record indicates that FWS took into account Plaintiffs' concerns before making its final decision and involved other government agencies before preparing its EA. (AR 1299, 1306-11); *See* 40 C.F.R. § 1501.4(b). That FWS did not agree with the objections raised by the City and the State and others does not undermine the adequacy of FWS's NEPA review.

The record reveals that FWS adequately considered that Plaintiffs wanted to use this land for a Reservoir, but FWS nevertheless chose to establish the Refuge boundaries in the area. A review of the claims and the record indicate that Plaintiffs' disagreement with FWS is more akin to a political dispute over policy choices than a legal dispute over compliance with the procedural requirements of NEPA. "Neither the language nor the history of NEPA suggests that it was intended to give citizens a general opportunity to air their policy objections to proposed federal actions. The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777 (1983). To permit Plaintiffs to use the provisions of NEPA to voice their policy objections to FWS's actions and to hinder FWS's attempts to fulfill its mandate from Congress would be contrary to the purposes of NEPA.

CONCLUSION

After careful consideration of the briefing and applicable law, the Court hereby DENIES the City of Dallas's Motion for Partial Summary Judgment and GRANTS the Federal Defendants' Cross-Motion for Partial Summary Judgment Concerning City of Dallas's NEPA Claims. The Court hereby DENIES the Texas Water Development Board's Motion for Partial Summary Judgment and GRANTS the Federal Defendants' Cross-Motion for Partial Summary Judgment Concerning the Texas Water Development Board's NEPA Claims. The Court DENIES in PART and DENIES as MOOT in PART the Federal Defendants' Motion to Strike Plaintiffs' Extra-Record Materials. The Court GRANTS the Texas Conservation Alliance's Motion for Leave to File Amicus Brief and the Amicus Brief. The Court GRANTS Friends of the Neches River's and Houston Audobon Society's Motion for Leave to File a Letter in Support of Texas Conservation Alliance's Amicus Brief. The Court GRANTS Texas Water Conservation Association's Motion for Leave to File Amicus Brief in Support of Plaintiffs' Motions for Partial Summary Judgment. The Clerk's Office is hereby instructed to file Docket Numbers 106-3, 111-2 and 123-1 in accordance with this Order.

It is SO ORDERED, this 30th day of June 2008.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT
COURT JUDGE

Filed July 28, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CITY OF DALLAS, TEXAS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
H. DALE HALL et al.,	§	CIVIL ACTION NO.
	§	
Defendants.	§	3:07-CV-0060-P
	§	
	§	Consolidated with:
THE TEXAS WATER DEVELOPMENT BOARD,	§	CIVIL ACTION NO.
	§	
Plaintiff,	§	3:07-CV-0213-P
	§	
	§	
v.	§	
	§	
THE UNITED STATES DEPARTMENT OF THE INTERIOR et al.,	§	
	§	
Defendants.	§	

ORDER

Now before the Court is Plaintiffs' Emergency Motion for Injunction Pending Appeal or, in the Alternative, Motion for Temporary Restraining Order and Preliminary Injunction, filed July 1, 2008. In their motion, Plaintiffs the City of Dallas ("City") and the Texas Water Development Board ("State") (collectively, "Plaintiffs") argue that injunctive relief is necessary pending appeal of this Court's partial summary judgment ruling to prevent the U.S. Fish and Wildlife Service ("FWS") from accepting a transfer of land into the Neches River National Wildlife Refuge ("Refuge") because such a transfer would irreparably harm Plaintiffs.

On June 11, 2006, FWS designated a 25,281-acre site within Anderson and Cherokee Counties, Texas as the Neches River National Wildlife Refuge. Plaintiffs want to use the same land on the Upper Neches River for development of a reservoir to serve the future water needs of Dallas residents and other customers. Plaintiffs filed this legal action against the Federal Defendants[1] ("Defendants") seeking reversal of FWS's decision to establish the Refuge without preparing an Environmental Impact Statement ("EIS") or an adequate Environmental

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[1] The Federal Defendants include Defendant H. Dale Hall, in his official capacity as Director of the United States Fish and Wildlife Service; Dick Kempthorne, in his official capacity as the Secretary of the United States Department of the Interior; Benjamin N. Tuggle, in his official capacity as the Regional Director of the Southwest Region (Region 2) of the United States Fish and Wildlife Service; and the United States Department of the Interior.

Assessment ("EA") as required by the National Environmental Policy Act. On June 30, 2008, this Court issued an order granting partial summary judgment in favor of the Federal Defendants ("Defendants") and found that FWS was not required to prepare an EIS and that its EA was adequate.

Rule 62(c) of the Federal Rules of Civil Procedure authorizes district courts to suspend, modify, restore or grant an injunction pending appeal. *See* Fed. R. Civ. P. 62(c). The purpose of an injunction pending appeal is to maintain the status quo of the parties and ensure the effectiveness of the eventual judgment. *See Coastal Corp. v. Tex. Eastern Corp.*, 869 F.2d 817, 819 (5th Cir. 1989). The status quo in this case is memorialized by a standstill agreement the Parties have been complying with since early in this litigation.

In making a determination about whether to grant injunctive relief pending appeal, courts must consider whether the movant has made a showing that (1) it is likely to succeed on the merits on appeal; (2) it is likely to suffer irreparable injury if the stay is denied; (3) the non-movant will not be substantially harmed by the granting of a stay or injunction; and (4) the granting of an injunction will serve the public interest. *See Drummond v. Fulton Co. Dep't of Family and Children's Servs.*, 532 F.2d 1001, 1002 (5th Cir. 1976). The Fifth Circuit has held that in cases where a serious legal question is presented, the court may use an equitable approach and enter an injunction even if the movant has not shown a high likelihood of success on the merits. *See Estelle v. Ruiz*, 650 F.2d 555, 565 (5th Cir. 1981). "[T]he movant need only present a substantial case on the merits when a serious legal question is

involved and when the balance of the equities weighs heavily in favor of granting the stay." *Id.* The Fifth Circuit recognized that "if a movant were required in every case to establish that the appeal would probably be successful, the Rule would not require as it does a prior presentation to the district judge whose order is being appealed. That judge has already decided the merits of the legal issue. The stay procedure . . . affords interim relief where relative harm and the uncertainty of final disposition justify it." *Id.* at 565-66.

Defendants contend that the Fifth Circuit's less-stringent *Estelle* standard for granting an injunction pending appeal was rejected by the United States Supreme Court earlier this year and that the traditional "likelihood of success on the merits" standard applies to this case. *See Munaf v. Geren*, – U.S. – 128 S.Ct. 2207, 2210 (2008). Defendants argue that the injunction should not be issued because Plaintiffs have not established a likelihood of succeeding on the merits or irreparable harm and because Defendants will be harmed by entry of an injunction.

In *Munaf*, Plaintiff Omar was an American citizen who was accused of committing crimes while traveling in Iraq. He was captured and placed in custody by military forces operating as part of a multi-national coalition force, under the command of U.S. military officers. His family filed a habeas petition on his behalf in federal district court in the United States. When Omar's criminal case was referred to the Iraqi criminal court system, Omar's attorney sought and obtained a preliminary injunction from the United States District Court barring Omar's transfer from United States custody

to Iraqi custody. The Supreme Court found that the district court erred by failing to analyze whether Omar had established that his habeas petition was likely to succeed on the merits. The Supreme Court held that the district court's finding that the jurisdictional issues in the case were "serious, substantial, difficult, and doubtful" was insufficient to warrant injunctive relief. *Id.* at 2218-19.

Unlike this case and the cases governed by *Estelle v. Ruiz*, *Munaf* does not involve a preliminary injunction pending appeal.[2] Therefore, whereas the traditional preliminary injunction standard applied in *Munaf*, the Court in this case may enter an injunction if Plaintiffs can meet the less-stringent *Estelle* standard.

Under *Estelle* and its progeny, Plaintiffs must show they will probably succeed on the merits in their appeal of this Court's order or, if a serious legal question is involved, that they have presented a substantial case on the merits and that the balance of equities weighs heavily in favor of granting a stay.

Plaintiffs argue correctly that the *de novo* appellate issue of whether FWS complied with NEPA will depend on the Fifth Circuit's interpretation and application of *Sabine River Authority v. U.S. Department of the Interior*, 951 F.2d 669 (5th Cir. 1992). Defendants argued to this Court that *Sabine River* controlled the outcome of this case because it held as a matter of law that this type of EA was adequate under this set of circumstances. FWS believes it was not required to

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[2] The *Nichols* case cited by Defendants is distinguishable from this case and *Estelle* for the same reason(s). *See Nichols v. Alcatel USA, Inc.*, – F.3d –, No. 07-40477, 2008 WL 2469407 (5th Cir. Jun. 20, 2008).

consider or discuss certain direct or indirect effects of the Refuge on the region in light of the speculative nature of the Reservoir and the holding in *Sabine River*. In its partial summary judgment order, this Court held that *Sabine River* does control the outcome of this case as a matter of law, but provides guiding principles under which FWS and the courts must analyze the facts of each particular case. After engaging in its analysis, this Court held, *inter alia*, that FWS did not act arbitrarily and capriciously in its consideration of alternatives or in its ultimate conclusion that the Reservoir was speculative. On appeal, the Fifth Circuit will have an opportunity to decide, *inter alia*, whether NEPA requires the EA to analyze and discuss the indirect effects of the Refuge on the region's water supply and on its economy in making its determination that the Reservoir was speculative. The Court finds this to be a serious legal issue that may affect how this and other agencies conduct future Environmental Assessments under NEPA. Plaintiffs have presented a substantial case on the merits, as evidenced by the Court's orders at both the motion to dismiss and partial summary judgment stages.

Having satisfied the first prong, the Court must determine whether Plaintiffs are likely to suffer irreparable injury if the injunction is denied. The Record indicates that FWS believes that once it acquires an interest in property within the boundaries of the Refuge, the federal land cannot be subjugated by any local or state project and cannot be divested from the Refuge except through an act of Congress. Thus, allowing FWS to acquire any land within the Refuge boundaries could possibly render Plaintiffs' claims moot, which constitutes irreparable

harm. Additionally, the Court does not believe Defendants will suffer substantial harm by the granting of an injunction. Maintaining the status quo of the land while bringing this case to a conclusion will not harm Defendants or the land they seek to preserve. Finally, granting this injunction will serve the public interest – it will ensure the status quo is maintained so the legal system can resolve this important dispute about the future of this valuable land. The Court finds that the balance of equities weighs heavily in favor of granting an injunction and, therefore, Plaintiffs' motion for injunction pending appeal is hereby GRANTED. The parties are to abide by the terms of the standstill agreement currently in place until further order of this court or of the Fifth Circuit Court of Appeals.

It is SO ORDERED, this 28th day of July 2008.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT
COURT JUDGE

NATIONAL ENVIRONMENTAL POLICY ACT

42 U.S.C. § 4321

Congressional declaration of purpose.

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

* * * * *

42 U.S.C. § 4331 (excerpted)

Congressional declaration of national environmental policy.

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in

cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. . . .

* * * * *

42 U.S.C. § 4332 (excerpted)

Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall— . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes; . . .

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources; . . . .

* * * * *

TEXAS WATER CODE

§ 16.051 (excerpted)

State Water Plan: Drought, Conservation, Development, and Management.

(a) Not later than January 5, 2002, and before the end of each successive five-year period after that date, the board shall prepare, develop, formulate, and adopt a comprehensive state water plan that incorporates the regional water plans approved under Section 16.053. The state water plan shall provide for the orderly development, management, and conservation of water resources and preparation for and response to drought conditions, in order that sufficient water will be available at a reasonable cost to ensure public health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the entire state. . . .

* * * * *

§ 16.053 (excerpted)

Regional Water Plans

(a) The regional water planning group in each regional water planning area shall prepare a regional water plan, using an existing state water plan identified in Section 16.051 of this code and local water plans prepared under Section 16.054 of this code as a guide, if present, that provides for the orderly development, management, and conservation of water resources and preparation for and response to drought conditions in order that sufficient water will be available at a reasonable cost to ensure public health, safety, and welfare; further economic

development; and protect the agricultural and natural resources of that particular region. . . .

(e) Each regional water planning group shall submit to the development board a regional water plan that: . . .

(5) includes but is not limited to consideration of the following: . . .

(C) all potentially feasible water management strategies, including but not limited to improved conservation, reuse, and management of existing water supplies, conjunctive use, acquisition of available existing water supplies, and development of new water supplies; . . .

(F) appropriate provision for environmental water needs and for the effect of upstream development on the bays, estuaries, and arms of the Gulf of Mexico and the effect of plans on navigation; . . . .

* * * * *

COUNCIL ON ENVIRONMENTAL QUALITY REGULATIONS

40 C.F.R. § 1500.1 (excerpted)

Purpose.

. . . **(b)** NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. . . .

* * * * *

40 C.F.R. § 1500.6 (excerpted)

Agency authority.

. . . Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

* * * * *

40 C.F.R. § 1501.4 (excerpted)

Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall: . . .

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement. . . .

* * * * *

40 C.F.R. § 1502.14 (excerpted)

Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. . . .

* * * * *

40 C.F.R. § 1502.16 (excerpted)

Environmental consequences.

. . . The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).) . . . .

* * * * *

40 C.F.R. § 1502.22 (excerpted)

Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement

and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: **(1)** A statement that such information is incomplete or unavailable; **(2)** a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; **(3)** a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and **(4)** the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason. . . .

* * * * *

40 C.F.R. § 1502.24 (excerpted)

Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

* * * * *

40 C.F.R.§ 1507.2 (excerpted)

Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall: . . .

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements. . . .

* * * * *

40 C.F.R. § 1508.7

Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

* * * * *

40 C.F.R. § 1508.8

Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic,

social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

* * * * *

40 C.F.R. 1508.9

Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

* * * * *

40 C.F.R.§ 1508.14

Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

* * * * *

40 C.F.R. § 1508.25 (excerpted)

Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include: . . .

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the

proposed action).

(c) Impacts, which may be:

(1) Direct;

(2) indirect;

(3) cumulative.

* * * * *

40 C.F.R. § 1508.27 (excerpted)

Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity: . . .

(2) The degree to which the proposed action affects public health or safety. . . .

* * * * *

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Nos. 08-1520 and 08-1524

In the Supreme Court of the United States

CITY OF DALLAS, TEXAS, PETITIONER

v.

ROWAN W. GOULD, DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.

TEXAS WATER DEVELOPMENT BOARD, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
ANNA T. KATSELAS
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly held that the United States Fish and Wildlife Service's environmental assessment and finding of no significant environmental impact, pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, with respect to the Service's designation of boundaries for a new National Wildlife Refuge, were not arbitrary and capricious.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 562 F.3d 712. The opinion of the district court (Pet. App. 21a-59a) is unreported.[1]

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and petition appendix in No. 08-1520.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2009. The petitions for a writ of certiorari were filed on June 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public about those effects. 42 U.S.C. 4332(2)(C). Pursuant to NEPA and its implementing regulations, the United States Fish and Wildlife Service (FWS) prepared an environmental assessment of the environmental impact of establishing the Neches Wildlife Refuge along the Upper Neches River in Texas, and concluded that no significant environmental impact would arise, obviating the need to undertake a more detailed environmental impact statement. Petitioners challenged that decision as arbitrary and capricious. The district court granted FWS's motion for summary judgment and its motion to dismiss petitioners' NEPA claims. Pet. App. 21a-59a. The court of appeals affirmed. *Id.* at 1a-20a.

1. a. The Secretary of the Interior, through FWS, is charged with administering the National Wildlife Refuge System (System). 16 U.S.C. 668dd(a)(1). The System's purpose is to establish and "administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." 16 U.S.C. 668dd(a)(2). In administering the System, the Secretary is required to,

among other things, "plan and direct the continued growth of the System in a manner that is best designed to accomplish [its] mission," and "to contribute to the conservation of the ecosystems of the United States." 16 U.S.C. 668dd(a)(4)(C).

b. Under NEPA, whenever an agency proposes a "major Federal action[] significantly affecting the quality of the human environment," it must prepare a detailed statement on the environmental impact of the proposed action, termed an environmental impact statement (EIS). 42 U.S.C. 4332(2)(C). The Council on Environmental Quality (CEQ) has promulgated regulations to guide federal agencies in determining what actions are subject to that statutory requirement. See 40 C.F.R. 1500.3; *Andrus* v. *Sierra Club*, 442 U.S. 347, 357 (1979). The CEQ regulations allow an agency to comply with NEPA by preparing a more limited document, known as an environmental assessment (EA), in order to determine whether a full EIS is necessary. See 40 C.F.R. 1501.3, 1501.4. An EA is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. 1508.9(a) and (a)(1). If the agency determines on the basis of the EA that an EIS is not required, then it must issue a "finding of no significant impact," which is a document "briefly presenting" the reasons that the agency action will not have a significant impact on the human environment. 40 C.F.R. 1501.4(e), 1508.13.

NEPA does not mandate particular substantive results, but instead simply prescribes the necessary process to ensure that agencies are fully informed with respect to the environmental consequences of their proposed projects. See *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989); *Vermont*

Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519, 558 (1978). "[I]nherent" in NEPA's procedural requirements is a "rule of reason" that relieves agencies of the obligation to consider every conceivable environmental effect, if doing so would be of little value to the decision-making process. *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 767-768 (2004); *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 373 (1989). Thus, an agency must consider an environmental effect of a proposed major federal action only if there is "a reasonably close causal relationship between the environmental effect and the alleged cause." *Public Citizen*, 541 U.S. at 767 (internal quotation marks omitted). This Court has "analogized this requirement to the familiar doctrine of proximate cause from tort law." *Ibid.*

2. In 1961, the State of Texas identified the Upper Neches River area as a potential site on which to build a water-supply reservoir, known as the Fastrill Reservoir. Pet. App. 2a. For more than forty years, petitioners took no substantial steps towards planning, analyzing or building the reservoir, but periodically listed the site in state and local water plans as one of a number of potentially suitable reservoir sites. *Id.* at 2a-3a. When mentioned, the reservoir was described as potentially being constructed in 2050 and tapped in 2060. *Id.* at 2a, 37a.

In 1985, FWS identified the Upper Neches River area as an ecologically important bottomland hardwood habitat, and labeled the site as a high priority for protection. Pet. App. 2a-3a. The bottomland ecosystem supports a diverse array of plants and animals, and contains important wintering habitats for various waterfowl species. Gov't R.E. 3518-3519. FWS prepared a preliminary refuge proposal in 1988 and subsequently pre-

pared, but did not publish, a draft EA. Pet. App. 3a. FWS did not proceed with the proposal at that time largely because of a lack of funding. *Ibid.*

In 2003, FWS reactivated the project because of large-scale timber divestment occurring along the Neches River. Gov't C.A. Br. 10. In June 2004, FWS officially introduced to the public the study for the proposed refuge. *Ibid.* FWS held public workshops in July 2004 and made a presentation about the project to the East Texas Regional Water Planning Group and other interested members of the public in October 2004. Pet. App. 3a, 57a.

With information generated from the study phase, FWS prepared an EA addressing the potential impacts of the proposed project, and also prepared land protection and concept management plans. The EA evaluated three alternatives, including: (1) a "no action" alternative; (2) the recommended 25,281-acre configuration; and (3) a narrower 15,294-acre configuration. Pet. App. 3a. The EA acknowledged the reservoir proposal, and noted that only the no-action alternative would preserve the possibility that the reservoir could be built, because the reservoir could not be constructed on land designated as a wildlife refuge absent congressional action. *Id.* at 3a, 42a; Gov't R.E. 3539, 3543. But because no feasibility study had been conducted and the precise location of the reservoir was undecided, the EA concluded that the reservoir project was speculative, and that it was impossible to meaningfully assess whether and how the refuge and reservoir plans might interface.[2] Pet. App. 42a; Gov't R.E. 3534.

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[2] In March 2005, having learned of FWS's renewed consideration of the refuge site, the City had commissioned a feasibility study, but it was not yet complete. Pet. App. 3a; Gov't C.A. Br. 10, 13-14.

In May 2005, FWS distributed the EA to public officials and interested groups and held two public hearings. Pet. App. 3a, 57a. Petitioners were invited to participate in the comment process and meetings, but they did not submit any proposals for alternative refuge sites or for developing both the refuge and the reservoir. *Id.* at 55a, 57a. FWS received more than 1,600 comments on the proposal, the majority of which favored establishment of the Refuge. *Id.* at 3a, 57a; Gov't C.A. Br. 12. FWS responded to comments from governmental agencies, including petitioners, regarding the future prospects for a reservoir within the boundaries of the proposed Refuge, Pet. App. 57a, and pointed out that if the Refuge was established, state officials could request that Congress authorize the Secretary to take the necessary steps to allow the construction of the reservoir. Gov't C.A. Br. 12. On July 28, 2005, FWS determined that an EIS was unnecessary and issued a Finding of No Significant Impact (FONSI). Pet. App. 3a.

In August 2005, shortly after FWS issued the FONSI, the Texas legislature designated the reservoir a "critical resource." Pet. App. 3a-4a. Throughout early 2006, FWS repeatedly met with representatives of the City of Dallas (City) and other entities to determine whether an alternative refuge site of equal or greater ecological value could be identified. *Id.* at 4a.

FWS set a June 1, 2006, deadline for its decision whether to designate the area as a wildlife refuge. Pet. App. 54a. At that point, the City's feasibility study had not yet been completed, and no concrete steps toward development of the reservoir, such as applying for permits, had been taken. *Id.* at 4a. Moreover, the Director of the Texas Parks and Wildlife Department had informed FWS that no viable alternative refuge site had

been identified. Gov't C.A. Br. 14. FWS issued its final decision approving the 25,281-acre Refuge boundary on June 11, 2006, and shortly thereafter accepted a conservation easement from a landowner within the acquisition boundary. *Id.* at 4a; Gov't C.A. Br. 14.

3. In January 2007, petitioners filed suit against respondents in the United States District Court for the Northern District of Texas, alleging, *inter alia*, that FWS's EA was insufficient and its decision not to undertake an EIS was arbitrary and capricious, in violation of NEPA. Pet. App. 4a. The district court granted partial summary judgment to FWS, rejecting petitioners' assertions that FWS had failed adequately to consider the impact of its refuge designation on the prospects for a reservoir, had failed to consider alternative proposals, and had relied on outdated data. *Id.* at 21a-59a.

4. The court of appeals affirmed. Pet. App. 1a-20a. Reviewing the sufficiency of FWS's EA under the arbitrary-and-capricious standard, see *Public Citizen*, 541 U.S. at 763, the court first found that FWS had not acted arbitrarily and capriciously in declining to analyze the potential effects of the refuge designation on future water supplies, Pet. App. 5a-6a, 10a-11a. In view of the uncertainty about whether the reservoir would ever have been constructed and its role in supplying the region's future water needs, the court held that the refuge designation could not be considered the proximate cause of any effect on water supplies. *Id.* at 6a-9a. The court also concluded that the EA considered an adequate range of alternatives, and that in any event, petitioners failed to proffer viable alternative proposals to FWS during the comment period and the subsequent discussions. *Id.* at 9a-10a. The court also rejected petitioners' contention that FWS arbitrarily relied on outdated data

that were insufficient to permit a reasoned decision, *id.* at 11a-13a, and upheld FWS's choice of a 20-year time horizon as reasonable, *id.* at 13a-14a.

Finally, the court upheld FWS's decision not to undertake an EIS as not arbitrary and capricious in view of FWS's "reasoned decision," in its EA, "that there were no significant environmental effects." Pet. App. 17a. The court also rejected the Texas Water Development Board's (TWDB) argument that the refuge designation itself would have significant physical effects on the environment, noting that the designation itself would not change the physical attributes or the maintenance of the land. *Id.* at 18a-19a (citing *Sabine River Auth.* v. *United States Dep't of the Interior*, 951 F.2d 669 (5th Cir.), cert. denied, 506 U.S. 823 (1992)).

ARGUMENT

Petitioners renew their contention that FWS acted arbitrarily and capriciously in crafting its EA, and in concluding that the refuge designation would have no significant environmental impact. The court of appeals correctly rejected petitioners' arguments, and its fact-bound decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners first contend (Pet. 11-29; 08-1524 Pet. 23-31) that FWS's EA was insufficient because it failed to consider the effects on the state and city water supplies that might result from not building the reservoir, as well as effects on as-yet undetermined alternative sites where petitioners might in the future decide to build a reservoir.

a. The court of appeals correctly held that FWS was not required to analyze the refuge designation's poten-

tial effects on future water supplies and urban planning because any such effects would not be proximately caused by FWS's action. Pet. App. 9a-11a. Petitioners acknowledge (Pet. 12; 08-1524 Pet. 24) that FWS was required only to consider proximately related, reasonably foreseeable impacts of its action, see *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 767 (2004), and they do not contend that the court of appeals did not apply this standard, see Pet. App. 9a. Rather, petitioners challenge the court of appeals' fact-bound conclusion that FWS permissibly determined that the reservoir-related effects were not reasonably foreseeable.

As FWS and the court of appeals found, the connection between FWS's establishment of the refuge boundary and the alleged effects on the City's water supply is far too attenuated to fall within NEPA's sphere. See *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 772-774 (1983). Petitioners "never committed to constructing the reservoir and may never have done so." Pet. App. 11a. Petitioners had not taken any concrete steps "such as seeking permits, acquiring property, or commencing any of the hydrological, fiscal, or environmental studies necessary to a major public works project." *Ibid.* As a result, petitioners might have decided not to construct the reservoir for any number of reasons that would be unrelated to FWS's action—for instance, if eventual studies showed that the reservoir was impracticable. Reflecting the tentative nature of petitioners' plans, petitioners "never identified the precise role the reservoir—even if constructed and tapped in 2060—will play in supplying the region's" water. *Ibid.* NEPA does not require agencies to attempt to analyze effects that are susceptible to innumerable intervening occurrences that could break the causal

chain leading from the federal action at issue. See *Metropolitan Edison*, 460 U.S. at 772-774; *Public Citizen*, 541 U.S. at 767 (courts must draw a "manageable line" respecting causation).

TWDB also contends (08-1524 Pet. 24-27) that FWS was required to analyze a sweeping range of potential effects that allegedly might flow from not constructing the reservoir, including the environmental effects of constructing a reservoir on a different, as-yet-undetermined site. But the court of appeals correctly concluded that an analysis of the impact of establishing the refuge boundary on future decisions by others about what water sources to develop in the future, and the effects of such unknown decisions on future water supply problems in the region, could not be based on anything but conjecture. Pet. App. 11a. NEPA does not require agencies to engage in projections that would be too speculative to aid the decision-making process. See *Public Citizen*, 541 U.S. at 767 ("inherent in NEPA and its implementing regulations is a 'rule of reason'"); *Metropolitan Edison*, 460 U.S. at 776.

b. The City contends (Pet. 26-29) that the court of appeals' conclusion that the designation of the refuge would not proximately cause effects on future water supplies conflicts with this Court's decisions in *Public Citizen* and *Metropolitan Edison*. In *Public Citizen*, the Court upheld the agency's decision not to address in its EA the environmental effects of allowing Mexican trucks to drive into the United States, because the agency had "no ability categorically to prevent the cross-border operations of Mexican motor carriers." 541 U.S. at 768. Contrary to the City's contentions (Pet. 27), that conclusion does not mean, nor did this Court suggest, that an agency must invariably consider all effects

that it "has authority to create or prevent," even if those effects are not proximately related to the action at issue. See *Oregon Natural Res. Council Fund* v. *Brong*, 492 F.3d 1120, 1134 n.20 (9th Cir. 2007) (agency should consider proximate effects it has authority to prevent). Rather, in emphasizing that NEPA is intended to impose a manageable, not unlimited, obligation to consider effects proximately caused by the proposed action, *Public Citizen* supports the court of appeals' decision. 541 U.S. at 767-768. *Metropolitan Edison*, 460 U.S. at 774, is to the same effect.

c. The City also argues (Pet. 11-12, 16-17) that the court's proximate-cause holding conflicts with decisions of other courts of appeals. The cases on which petitioners rely, however, simply applied the proximate-cause standard to distinguishable factual scenarios in which the relevant agency had failed to assess the effects of currently existing circumstances or virtually inevitable future actions, often in the context of the more detailed analysis necessary in an EIS. See *Oregon Natural Res. Council Fund* v. *Goodman*, 505 F.3d 884, 892-893 (9th Cir. 2007) (EIS for the expansion of a ski area must consider cumulative impacts in light of two other already-scheduled projects in the area); *Save Our Sonoran, Inc.* v. *Flowers*, 408 F.3d 1113, 1121-1123 (9th Cir. 2005) (agency analysis was artificially limited to a portion of the planned development project); *Kern* v. *United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1072-1073, 1075 (9th Cir. 2002) (addressing agency's failure to consider effect of timber sales on spread of fungus in surrounding areas); *Oregon Natural Res. Council* v. *Marsh*, 832 F.2d 1489, 1498 (9th Cir. 1987), rev'd on other grounds, 490 U.S. 360 (1989) (EIS did not adequately consider proposed dam's impact in conjunction with existing dams in

the area); *Sierra Club* v. *Marsh*, 769 F.2d 868, 872, 878 (1st Cir. 1985) (NEPA analysis must consider effects of building a cargo port and causeway on an island in light of second planned phase of industrial development, which consisted of detailed plans and which was virtually certain to occur); *Scientists' Inst. for Pub. Info., Inc.* v. *AEC*, 481 F.2d 1079, 1085-1093 (D.C. Cir. 1973) (rejecting argument that NEPA did not apply at all to a technology development program). In sum, as the court of appeals observed, petitioners have pointed to no case requiring an agency to analyze the effects of its action on a proposed but highly contingent future project.[3] Pet. App. 10a-11a.

d. The City also contends (Pet. 23-25) that the court of appeals' decision leaves "federal agencies * * * free to ignore" state and local water-management plans, raising federalism concerns. FWS did not "ignore" petitioners' water-supply plans, however; it consulted extensively with state and local authorities throughout the decision-making process, even long after the FONSI was complete, and reasonably determined that the possibility of a reservoir was too speculative to be proximately affected by the refuge designation. NEPA does not require any more than that. To the extent petitioners contend that FWS's substantive decision to desig-

[3] Petitioners also argue (Pet. 17-18; 08-1524 Pet. 28-31) that the 20-year time horizon selected by FWS was arbitrary and capricious. The court of appeals correctly rejected that argument. Pet. App. 13a-14a. The decisions that petitioners assert conflict with the court's conclusion simply evaluated specific time horizons in light of the action at issue. See, *e.g.*, *Selkirk Conservation Alliance* v. *Forsgren*, 336 F.3d 944, 962-963 (9th Cir. 2003). And in any event, FWS's decision not to further address the potential impact of not building the reservoir was based on its reasonable conclusion that the reservoir might not be built at all—a conclusion that did not depend on any particular time horizon.

nate the refuge notwithstanding petitioners' objections impinged on state sovereignty, NEPA—a procedural statute—does not provide a vehicle for such a challenge. And although petitioners asserted Tenth Amendment claims below, they have not renewed those claims, which the court of appeals rejected as meritless and waived, before this Court.[4] Pet. i; 08-1524 Pet. i.

2. The City next contends (Pet. 18-21) that FWS arbitrarily and capriciously failed to consider an adequate range of alternatives, including alternatives that would have permitted both the reservoir and the refuge to be built. But an EA need only consider a reasonable range of alternatives that would serve the purpose of the proposed project. See, *e.g.*, *Highway J Citizens Group* v. *Mineta*, 349 F.3d 938, 960 (7th Cir. 2003), cert. denied, 541 U.S. 974 (2004). Here, the court of appeals correctly upheld FWS's conclusion that it could not evaluate a dual-use proposal without knowing any specifics as to where a reservoir might be built; how large it would be; and whether it would be built at all. Pet. App. 9a.

In any event, petitioners made clear after the comment period had closed that they believed that the reservoir and the refuge could not co-exist, as their alternative proposals all would have required FWS to abandon the Upper Neches site entirely, and would have destroyed a significant portion of the riparian corridor. Pet. App. 9a. But as the court of appeals found, preserving the Upper Neches habitat was the very purpose of

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[4] FWS also did not contravene 40 C.F.R. 1506.2(b), which requires agencies to coordinate with state and local agencies. See 08-1524 Pet. 28. By its terms, that provision is directed to minimizing "duplication between NEPA and State and local requirements," not the circumstances in which an agency may decline to consider a possible impact on a state proposal.

the contemplated action. *Ibid.*; *id.* at 3a; Gov't R.E. 3517-3518. Petitioners point to no decision suggesting that NEPA required FWS to consider alternatives that would obviate the purpose of the planned action.[5]

None of the decisions on which petitioners rely (Pet. 20-23) conflicts with the court of appeals' holding, as all evaluated the relevant agency's consideration of alternatives in light of the specific facts of each case, often in the context of reviewing the more extensive analysis required in an EIS. See, *e.g.*, *Center for Biological Diversity* v. *National Highway Traffic Safety Admin.*, 538 F.3d 1172, 1218 (9th Cir. 2008) (agency refused to consider reasonable, less environmentally damaging alternatives submitted by parties); *Davis* v. *Mineta*, 302 F.3d 1104, 1120-1122 (10th Cir. 2002) (agency refused to consider in EA proposed alternatives that were feasible and less damaging to the environment); *Muckleshoot Indian Tribe* v. *USFS*, 177 F.3d 800, 813 (9th Cir. 1999) (EIS involving transfer of old-growth forest to private companies insufficient where agency failed to consider alternatives that would have been more protective of the forest and therefore more consistent with agency's stated policy goals); *Simmons* v. *United States Army Corps of Eng'rs*, 120 F.3d 664, 669-670 (7th Cir. 1997) (agency may not artificially limit its consideration of viable alternatives to those preferred by the beneficiary of the pro-

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[5] As the court of appeals noted, Pet. App. 9a, even had these alternatives been consonant with the purpose of the designation, they were not presented during the comment period. See *Public Citizen*, 541 U.S. at 764-765 (challengers should present proposed alternatives during the comment period). Contrary to the City's suggestion (Pet. 22), requiring those challenging an EA to present proposed alternatives during the comment period does not improperly "shift[] the burden" of compliance with NEPA.

ject); *Methow Valley Citizens Council* v. *Regional Forester*, 833 F.2d 810, 815 (9th Cir. 1987) (EIS, which must consider "every" reasonable alternative, should have considered alternative locations because the proposed action was not tied to a particular location), rev'd on other grounds *sub nom. Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989); see also Pet. 21-22 (citing decisions and regulations applying to EIS).

3. The City next contends (Pet. 29-34) that FWS relied on "outdated" data in its EA, pointing to FWS's use of some data from its 1988 EA. Pet. 32. The only allegedly outdated data that the City identifies, however, related to the amount of bottomland hardwood cover; the City contends that the hardwood cover on the refuge site had diminished in the interval between 1988 and 2004, making the Upper Neches site less effective as a wildlife refuge. *Ibid.* But an EA need only contain "sufficient" information to enable the agency to decide whether an EIS is necessary, 40 C.F.R. 1508.9(a)(1), and FWS performed its own examination of the site in 2004, concluding that notwithstanding hardwood diminishment, the site remained appropriate for the refuge. Pet. App. 48a. The court of appeals correctly held that that was sufficient for purposes of an EA.[6] *Id.* at 12a-13a; see *Public Citizen*, 541 U.S. at 767 (noting "rule of rea-

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[6] The court did not assume, as the City suggests (Pet. 33), that reliable data were not necessary because the refuge designation was conservation-related. Rather, the court distinguished the decisions on which petitioners relied as involving situations in which the agency was considering whether to undertake environmentally harmful actions, and failed to obtain adequate data on the extent of the potential effects. Pet. App. 12a. Here, the City challenges FWS's reliance on its own examination (as well as data) in applying its expert judgment and concluding that the refuge site was an important habitat that should be preserved.

son" applicable to EAs). The City's argument therefore reduces to a disagreement with FWS's ultimate decision to designate the refuge. But NEPA requires only that the agency make an informed decision; it does not require an agency to reach any particular substantive result. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978).

In arguing that the court of appeals' decision deviates from those of other circuits, the City relies (Pet. 31-32 & n.14) on inapposite cases concerning the "scientific integrity" requirements applicable to an EIS under 40 C.F.R. 1502.24, or procedural situations not presented here. See, *e.g.*, *New Mexico ex rel. Richardson* v. *Bureau of Land Mgmt.*, 565 F.3d 683, 704-707 (10th Cir. 2009) (evaluating sufficiency of data in EIS); *Idaho Sporting Congress Inc.* v. *Alexander*, 222 F.3d 562, 567 (9th Cir. 2000) (disapproving use of supplemental reports to present omitted data because such reports are not contemplated by NEPA or its regulations); *Seattle Audubon Soc'y* v. *Espy*, 998 F.2d 699, 704-705 (9th Cir. 1993) (EIS for adoption of spotted owl management plan failed to consider new scientific uncertainty regarding evidence on which the agency's strategy rested).

4. TWDB next contends (08-1524 Pet. 32-37) that the court of appeals' holding that FWS reasonably concluded no EIS was necessary conflicts with the Tenth Circuit's decision in *Catron County Board of Commissioners* v. *United States Fish & Wildlife Serv.*, 75 F.3d 1429 (1996) (*Catron County*). TWDB is incorrect.

In *Catron Country*, FWS argued that it was not required to consider the environmental impact of its designation of a critical habitat under the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, because the ESA entirely superseded NEPA's requirements. In support

of that argument, FWS contended that NEPA compliance was unnecessary because a critical-habitat designation could have only beneficial environmental effects. *Catron County*, 75 F.3d at 1437. In rejecting that position, the court stated that NEPA broadly applies to all federal action, regardless of whether a proposed action is projected to have a beneficial or detrimental effect on the environment, and it also noted that the fact that the action in question was taken pursuant to the ESA did not necessarily mean that it would have no detrimental effects on other aspects of the environment. *Ibid.*

Because the only question at issue in *Catron County* was whether the agency's action was entirely exempt from NEPA's requirements, the court had no occasion to consider when an agency proceeding in accordance with NEPA need not undertake an EIS. Here, in contrast, FWS has never contended that NEPA does not apply to the designation of the refuge. Rather, the agency complied with NEPA's framework, and determined that its action would have no significant environmental effects necessitating an EIS. The court of appeals approved that determination because FWS complied with NEPA in preparing an EA, "made a reasoned decision that there were no significant environmental effects" flowing from the establishment of an acquisition boundary, and "properly * * * made a FONSI." Pet. App. 17a; see *Public Citizen*, 541 U.S. at 764. There is thus no conflict between the decision below and *Catron County*.[7]

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[7] For the same reasons, any conflict between *Catron County* and *Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996), which held that the ESA's procedures superseded NEPA (see 08-1524 Pet. 34-35), is not implicated here.

Nonetheless, TWDB suggests (08-1524 Pet. 35-36) that the court of appeals assumed that all boundary designations and conservation-related actions necessarily will not have any detrimental environmental effects, thereby diverging from *Catron County*. To the contrary, the court simply stated that, in addition to the lack of proximate relation to any effect on the City's water supply, FWS's FONSI was supported by the fact that the designation would not effect any current physical change in the land or alter the way in which the land is currently used. Pet. App. 18a (citing *Sabine River Auth.* v. *United States Dep't of the Interior*, 951 F.2d 669, 680 (5th Cir.), cert. denied, 506 U.S. 823 (1992), which approved a FONSI in similar circumstances, where the boundary designation did not alter the existing land use in any way and any effect on future water supply was not proximately related). The court's approval of the FONSI was thus based on the specific characteristics of the refuge designation at issue in this case.[8] *Id.* at 6a-18a. The court's fact-bound conclusion that FWS reasonably determined that the designation of the refuge would not have a significant impact on the environment is correct, and does not warrant further review.

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[8] Even if the court had made such an assumption, its holding would not conflict with that of *Catron County*, because that decision did not concern the circumstances in which potential environmental effects are significant enough to require an EIS under NEPA.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
ANNA T. KATSELAS
Attorney

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JAN 20 2010

No 08-1520

In The Supreme Court of the United States

CITY OF DALLAS, TEXAS, *Petitioner,*
v
ROWAN W GOULD, DIRECTOR OF THE UNITED STATES FISH AND WILDLIFE SERVICE, *ET AL*, *Respondents*

On Petition For A Writ Of Certiorari To The United State Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN C MARTIN
Counsel of Record
AMY B CHASANOV
Crowell & Moring LLP
1001 Pennsylvania Ave , NW
Washington, DC 20004-2595
(202) 624-2505

THOMAS P PERKINS, JR
CHRISTOPHER D BOWERS
City of Dallas
1500 Marilla Street
Dallas, TX 75201
(214) 670-3519

Counsel for Petitioner

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PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION

Pursuant to Supreme Court Rule 15.6, Petitioner City of Dallas files this Reply to address the new points raised in Respondent Fish and Wildlife Service's ("FWS")[1] Opposition Brief.

INTRODUCTION

In this case, long-planned public water supplies were given short shrift to make way for a wildlife refuge. The decision below would deprive 1.8 million people of a public water supply without so much as an inquiry into the impact or even the slightest analysis of a municipality's ability to secure other water sources FWS claims, without substantive explanation, that projecting beyond 20 years would be "speculative" even though state law *requires* assessment and planning for longer than that duration and the very impacts at issue here were assessed in the state process. FWS did not (1) consider the detailed information on environmental impacts or (11) foster informed public participation, in derogation of NEPA's fundamental purposes. *Dep't of Transp v. Public Citizen*, 541 U.S 752, 768 (2004) (citation omitted)

FWS contends the Fifth Circuit's decision is defensible because it was "fact-based," but offers no principled basis on which to distinguish this case from other cases decided by this Court and other circuit courts. Because NEPA applies to *all* federal

[1] Respondents (Pet. at 11) are referred to collectively as FWS

agencies and because the Fifth Circuit's decision conflicts with decisions of this Court and other circuit courts such that NEPA law is no longer uniform, this Court should grant the petition. *Thompson v. Keohane*, 516 U.S. 99, 106 (1995).

ARGUMENT

A. The Fifth Circuit's Approval Of FWS's Reliance On Outdated Information Conflicts With Ninth Circuit Decisions.

1. FWS misrepresents the data it used.

That NEPA requires agencies to use high quality data in EAs is beyond dispute. *See* Pet. at 29-30 Here, the EA's text and data on bottomland hardwoods (protection of which was a primary purpose of the refuge), wildlife, vegetation, environmental impacts, and socioeconomic conditions were all lifted, much of it *word-for-word*, from a 20-year-old draft EA which relied on even older data. *Compare* Pet. at 9, 30, 32, App. 12a-13a, 49a *with* Opp. at 15. The EA does not *mention* the vaunted "examination of the site in 2004" upon which FWS now relies. Opp. at 15 The record reflects no evidence that FWS relied on this 2004 visit or any other recent information in its decisionmaking.[2] Nor does the EA account for the fundamental fact that bottomland hardwoods landcover—the feature this refuge supposedly seeks

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[2] *See* USCA5 2770 (FWS had not visited most of site within 10 years before EA's preparation), AR554 (to extent FWS did visit portion of acreage, it noted significant logging over last 20 years)

to protect—*had dwindled from 71 percent to 31 percent* within the proposed refuge. App 50a

An agency cannot simply declare that its information is "sufficient." Opp. at 15 The record must actually reflect a "hard look." *See, e g*, *Robertson v. Methow Valley Citizens Council*, 490 U S. 332, 350 (1989), *New Mexico v. Bureau of Land Mgmt.*, 565 F.3d 683, 707 (10th Cir. 2009); *Silverton Snowmobile Club v. U S Forest Serv.*, 433 F.3d 772, 781 (10th Cir. 2006). FWS admits that agencies must be "*fully informed* with respect to the environmental consequences of their proposed projects " Opp. at 3 (emphasis added). FWS was not "fully informed" here It approved the refuge without knowing what it was protecting or the full environmental consequences of its actions. Had FWS recently analyzed the refuge area, it would have learned of the degradation of the resources it sought to protect. If FWS decisionmakers had considered the loss of habitat, they likely would have recognized that other nearby areas were better suited for a refuge.[3] And, this location would have allowed for the City's planned reservoir. Pet. at 32 (citing App. 12a, 47a, 50a)

2. The Fifth Circuit's approval of FWS's reliance on outdated information conflicts with Ninth Circuit decisions.

The Fifth Circuit's decision approving FWS's actions directly conflicts with Ninth Circuit case law. Pet at 31-32 & n.14. FWS claims there is no conflict

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[3] The City's own study (that FWS never considered) concluded that other areas were superior to the depleted section designated by FWS App. 9a, 46a-47a

because the cases cited by the City involve EISs or "procedural situations not presented here" Opp at 16 Other than this empty declaration, FWS makes no attempt to distinguish two cases in the City's petition: *Lands Council v Powell*, 395 F.3d 1019 (9th Cir 2005) and *Klamath-Siskiyou Wildlands Center v. U.S. Forest Service*, 373 F. Supp 2d 1069 (E.D. Cal. 2004).[4]

The conflict with *Lands Council* is particularly stark. There, environmental groups challenged the Forest Service's reliance upon 13-year-old fish habitat data in its EIS The Ninth Circuit found that "any degradation or improvement in the last thirteen years" in fish habitat conditions was relevant to the agency's analysis 395 F 3d at 1031 While the data relied upon by an agency need not be "immediate," the "lack of up-to-date evidence" on important environmental consequences prevents an agency from making accurate impact assessments *Id* The Ninth Circuit rejected the agency's reliance on this "stale" data. *Id.* Plainly, application of the Ninth Circuit's jurisprudence would have required FWS to update its environmental information (particularly on the bottomland hardwoods it sought to protect).

In *Klamath-Siskiyou*, the district court applied this high quality data standard *in an EA*. The district court found that the Forest Service's conclusions should not be based on "incomplete and outdated information" because that would render "the overall conclusions uncertain" *Klamath-Siskiyou*, 373 F. Supp 2d at 1081 Without recent,

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[4] Westlaw indicates the Fifth Circuit's decision criticizes *Lands Council* and distinguishes *Klamath-Siskiyou*

thorough surveys of certain geographical areas within the project area, the court found the agency did not know or understand its project's actual effects (in that case the presence of owls and their habitat) *Id.* The court concluded that the agency's ten-year-old information likely "dramatically misrepresents" the environmental impacts, rendering the agency unable to support its fundamental conclusions about the significance of the project's effects *Id.* at 1081, 1083 In this case, the City's subsequent studies actually *demonstrate* that data in the EA "misrepresent" environmental conditions

FWS goes so far as to suggest that NEPA allows agencies to use unreliable, antiquated data in EAs, but not EISs. Opp at 15-16. That assertion is belied not only by the Ninth Circuit's jurisprudence, but by the CEQ's regulations, 40 C F.R §§ 1500.1(b), 1502.24, and an EA's fundamental purpose, *id.* § 1508.9(a)(1). *See* Pet at 29-30. Nor could it meet NEPA's "hard look" standard. Under the EA standard advocated by FWS and approved by the Fifth Circuit, an agency need only a dim understanding of the current conditions on the very ground of its proposed action. Ignoring recent data essential to the purpose of an agency's proposed action is not a harmless departure from NEPA's mandatory requirements—it "greatly degrade[s]" NEPA's twin purposes. *New Mexico*, 565 F.3d at 708 If the Fifth Circuit's opinion is not corrected, it will provide legal cover for other federal agencies to ignore NEPA's data and scientific integrity requirements, and rely upon outdated information and assumptions in an EA or even an EIS.

B. The Fifth Circuit's Approval Of FWS's Refusal To Examine Suggested Alternatives Conflicts With Other Circuits.

1. FWS mischaracterizes the refuge's purpose and need.

As the petition explains (at 20), both FWS and the Fifth Circuit misstated the articulated purpose and need statement in FWS's EA, which in turn changed the legal analysis. Opp. at 13-14 ("preserving the Upper Neches habitat was the very purpose of the contemplated [agency] action"), App. 9a. This inaccuracy permeates FWS's Opposition and the Fifth Circuit's decision FWS's FONSI and EA defined three broad purposes, protecting (i) migrating bird habitats, (ii) bottomland hardwoods, and (iii) compatible recreation opportunities.[5] These NEPA documents *never* geographically limited the refuge to the *Upper* Neches. And nothing in this purpose statement would prevent the reservoir and refuge from coexisting.

2. The City proposed a joint refuge/reservoir alternative.

Contrary to FWS's assertions (Opp at 14, n.5), the City's comments on the EA explicitly recommended a joint refuge/reservoir alternative. USCA5 3644 (City requested "working together to develop a mutually beneficial proposal that incorporates both the Wildlife Refuge and Lake

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[5] *See* USCA5 2786-87 (EA), 3851-52 (FONSI).

Fastrill Reservoir").[6] FWS never performed even a cursory analysis of this alternative The City subsequently identified an environmentally superior location that it believed would allow a refuge/reservoir alternative FWS should have considered this alternative. *NRDC v. Evans*, 168 F. Supp. 2d 1149, 1160 (N.D. Cal. 2001) (EA alternatives inadequate because agency failed to address commenters' proposed alternatives, did not adequately explain that failure, and did not offer its own appropriate alternatives), *vacated in part on other grounds*, 316 F.3d 904 (9th Cir. 2003).

3. FWS was required to propose and study alternatives.

FWS—not the City—has the primary and nondelegable responsibility to propose alternative refuge locations.[7] NEPA requires *federal agencies* to "study, *develop*, and describe the appropriate alternatives to [the] recommended course[] of action in any proposal which involves *unresolved conflicts* concerning alternative uses of available *resources*." 42 U.S.C. § 4332(2)(E) (emphasis added); 40 C.F.R. § 1507.2(d), *New York v Dep't of Transp*., 715 F.2d 732, 742 (2d Cir. 1983) (42 U.S.C. § 4332(2)(E) applies to fresh water). That the City went so far as to prepare a subsequent study of available

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[6] Other commenters also discussed a feasible refuge/reservoir combination. *See* USCA5 2828-29, 2832-34, 4209-12.

[7] *Compare* Opp. at 14 n.5 *with Suffolk v. Sec'y of Interior*, 562 F 2d 1368, 1385 (2d Cir 1977) and *Davis v. Coleman*, 521 F 2d 661, 671 (9th Cir. 1975).

alternatives does not shift the responsibility for developing alternatives from FWS to the City.

4. The Fifth Circuit's decision on the alternatives conflicts with other circuits.

FWS's attempt to avoid precedent in the Second, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits depends on distorting the purpose and need for its proposed refuge. Case law in these jurisdictions holds that (i) alternatives fulfilling an EA's purpose and need are *per se* reasonable, (ii) alternatives cannot be limited to one geographical area if the agency's purpose and need statement is not similarly confined, and (iii) adoption of two nearly identical alternatives fails NEPA's "hard look" requirement Pet. at 19-21. The City's proposed joint refuge/reservoir alternative would not have conflicted with the refuge's *stated purpose* and should have been included in FWS's range of alternatives. Pet. at 18, 22.

Furthermore, the cases the City cites are not factually distinguishable Opp. at 14.[8] *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) provides just one obvious example of a circuit conflict There, the Tenth Circuit considered an agency's duty to discuss and evaluate appropriate alternatives in a "properly-drafted EA." *Id* at 1120 (in an EA, agency must consider more than simply the proposed project and a no action approach) In *Davis*, the agency rejected various alternatives—including the combination of two or more options that cumulatively met the

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[8] The City does not agree that EIS cases discussing the alternatives analysis are inapplicable Pet at 19

project's purpose and need—claiming they were too remote or speculative to be considered. *Id.* at 1121-22. The court held that the EA's detailed analysis of only two alternatives was arbitrary and capricious because the agency dismissed viable alternatives "in a conclusory and perfunctory manner." *Id.* at 1122, *see also Sabine River Auth. v. U.S. Dep't of Interior*, 745 F. Supp. 388, 399 (E.D. Tex. 1990) (FWS's EA considered a joint refuge/reservoir alternative, even though the planning for that reservoir was far more speculative and conducted before Texas adopted its current, more rigorous statutory water planning regime). Based on *Davis*, were the Tenth Circuit to decide this case, it would have required FWS to consider the City's proposal for a joint refuge/reservoir project.

C. The Fifth Circuit And FWS Misapply This Court's Precedent On Proximate Cause.

The refuge designation permanently[9] alters the range of water supply options available to the City, foreclosing the only reservoir the City had planned over the next 50 years and completely eliminating the most suitable site. Yet, the Fifth Circuit's interpretation of proximate cause excused FWS's decision to ignore the City's loss of a water supply source.

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[9] FWS asserts its refuge is permanent because only an act of Congress could divest the federal government of land once it is part of a refuge. USCA5 2803, 2812, 3855; App. 65a.

1. The Fifth Circuit and FWS omit an essential element of *Public Citizen* in their analyses.

In *Public Citizen*, this Court instructed that "courts must look to the *underlying policies or legislative intent* in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Public Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)) (emphasis added). The analysis is not, as FWS suggests, merely limited to drawing a "manageable" line. Instead, a reviewing court must draw the line between impacts included in the analysis and impacts deemed too remote or speculative to be included based upon NEPA's underlying policies. FWS drew its line too narrowly, excluding water supply impacts caused by the elimination of Fastrill Reservoir from a very limited array of potential water reservoir locations available to the City. In so doing, FWS failed to fulfill NEPA's underlying purposes: ensuring (i) agencies are fully informed of the environmental consequences of their actions, and (ii) the public is involved in the decisionmaking process. *Id.* at 768.

The Fifth Circuit endorsed FWS's claim that the impacts of its planned refuge on the City's future water supplies were too speculative to be considered. As evidence of that "speculativeness," the Fifth Circuit claims that the City and TWDB had neither taken any concrete steps toward constructing the reservoir nor "settled upon the exact position of the dam or footprint of the reservoir." App. 11a. FWS knew about the City's ongoing feasibility study and

subsequent study researching a joint refuge/reservoir combination. Nonetheless, FWS pushed ahead, issuing a FONSI on the basis of a draft EA FWS claimed the reservoir was speculative and never considered the refuge's impacts on the City's long-term water supply. The Fifth Circuit endorsed this "know-nothing" approach, making no attempt to explain how this decision complied with NEPA

The Fifth Circuit and FWS never justified their determinations that impacts on future water supplies are "speculative" under NEPA FWS's decision to permanently preserve land along the Upper Neches disregarded both fundamental policies underlying NEPA. First, FWS did not analyze the serious long-term risks to public health caused by its interference with state and local water planning. Second, FWS deprived the public of the opportunity to weigh the merits of two distinct public benefits, and the ability to evaluate their impacts on local water supply. Put simply, FWS's decision on what was "speculative" excluded from consideration a major environmental impact, thereby thwarting the two purposes of NEPA

2. The Fifth Circuit's decision conflicts with the Ninth Circuit's interpretation of speculativeness.

The Fifth Circuit claimed that the water supply impacts caused by FWS's decision to permanently preserve land were properly excluded from NEPA review because of the "uncertainty over whether the reservoir will be constructed and its impact on water supplies, and the long time frame for the project." App. 11a The Fifth Circuit suggests that a

"concrete step" such as a permit is a key element in determining whether an impact—or the risk of an impact—is sufficiently related to a project to merit consideration in a NEPA document.

This approach stands in stark contrast to the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v Nuclear Regulatory Commission*, 449 F.3d 1016, 1029-30 (9th Cir. 2006). There, the Ninth Circuit held that it was unreasonable for the Nuclear Regulatory Commission ("NRC") to dismiss categorically the possibility of a terrorist attack on a nuclear waste storage facility as too remote or speculative for NEPA review. The Ninth Circuit noted that this Court, in *Metropolitan Edison*, explicitly did not address a situation, such as that presented in *Mothers for Peace*, in which "an agency is asked to consider effects that will occur if a risk is realized" *Metropolitan Edison*, 460 U.S. at 775 n 9 The Ninth Circuit held that the NRC failed to address comments that the proposed action would increase the risk of a terrorist attack on the site

This case also concerns the impacts of a realized risk: the risk that Fastrill Reservoir would never be built. The City asked FWS to evaluate the water supply impacts of its decision to thwart the only reservoir planned for the next 50 years. If the refuge were not designated, the record suggests that there is at least as much likelihood that the City would construct Fastrill Reservoir as there is that terrorists would successfully attack a particular nuclear waste storage site Indeed, the record reflects that the City is required by law to make long-range water plans, that the reservoir was always part of that planning, that the City was undertaking a feasibility study, and that the City

directly expressed its intent by requesting FWS to delay its action or find a way to accommodate both land use goals. Pet. at 3-5; TWDB Pet. at 7-10, 18-20, 24-27. The Ninth Circuit, applying these facts to this Court's NEPA proximate cause jurisprudence, would have required FWS to consider these water supply impacts.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the City's petition should be granted.

Respectfully submitted

JOHN C. MARTIN *Counsel of Record* AMY B. CHASANOV Crowell & Moring LLP 1001 Pennsylvania Ave., NW Washington, DC 20004-2595 (202) 624-2505 *Counsel for Petitioner*	THOMAS P. PERKINS, JR. CHRISTOPHER D. BOWERS City of Dallas 1500 Marilla Street Dallas, TX 75201 (214) 670-3519